Supreme Court, U.S.
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No.

SUPREME COURT OF THE UNITED STATES

October 1994 Term

ARCO Products Co.,
Petitioner,

v.

Graham Oil Co.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Charles F. Adams (Counsel of Record)
Randolph C. Foster
Joseph D. Cohen
Stoel Rives Boley Jones & Grey
900 SW Fifth Avenue
Portland, OR 97204-1268
(503) 224-3380
Counsel for Petitioner

10200

QUESTIONS PRESENTED FOR REVIEW

1. Are parties to a franchise agreement governed by the Petroleum Marketing Practices Act ("PMPA") *per se* prohibited from mutually waiving procedures of the PMPA?

2. Under the Federal Arbitration Act, 9 U.S.C. § 2, and *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"), may a court invalidate an arbitration agreement in its entirety because of objectionable satellite provisions in that agreement?

3. If fact-finding is required to determine the validity or severability of an arbitration agreement, may a federal appellate court engage in fact-finding in the first instance?

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Petitioner ARCO Products Company[1] respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

REPORTS OF OPINIONS

The Ninth Circuit has one reported opinion in this case, *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244 (9th Cir. 1995). The opinion is authored by Judge Reinhardt and joined by Judge Brunetti. Judge Fernandez dissented.

JURISDICTION

The original decision in this case was filed December 16, 1994. On December 28, 1994, Peititioner filed a timely motion for an extension of time to move for rehearing. The motion was granted on January 6. On January 6, 1995, Peititioner filed its timely Petition for Rehearing with Suggestion for Rehearing En Banc. The Ninth Circuit denied that petition on March 16, 1995.

This Court has jurisdiction over this Petition under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

Federal Arbitration Act, 9 U.S.C. § 2; Petroleum Marketing Practices Act (PMPA), 15 U.S.C. §§ 2801-2806; Oregon

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[1] The named parties to the proceeding in the court below are Graham Oil Company and ARCO Products Company. Peititioner is a division of Atlantic Richfield Company, which has the following parents, subsidiaries, and affiliates within the scope of S.Ct. Rule 29.1: ARCO Chemical Company, Lynondell Petrochemical Company, and Vastar Resources, Inc.

Motor Fuel Franchises Act, Or. Rev. Stat. 650.200-.250 (1993). Pursuant to S.Ct. Rule 14.1(f), the text of these statutes is set out in the Appendix.

STATEMENT OF THE CASE

Petitioner ("Franchisor") is a gasoline company, and Respondent ("Franchisee") was one of its franchised distributors. This is a suit by Respondent Franchisee against Petitioner Franchisor for violation of the Petroleum Marketing Practices Act (PMPA) and Oregon Motor Fuel Franchises Act. *See* Complaint (Nov. 27, 1990) (CR 1; ER 1-6).[2] Franchisee pleaded that the district court had subject-matter jurisdiction under 15 U.S.C. § 2805 and pendent jurisdiction over the state law claim. *Id.* ¶ 2. The Complaint sought an injunction against termination or nonrenewal of a 1987 franchise agreement, damages, and attorney fees.

The 1987 franchise agreement[3] contained a provision (paragraph 23) on Resolution of Disputes. *See* Graham Aff. at 18 (CR-2). The Resolution of Disputes clause is over 400 words long. It also incorporates Procedures for Arbitration, attached as a separate exhibit (Exhibit E). *See* Procedures for Arbitration, Exhibit A to Defendant's Opposition to Plaintiff's Motion (CR-27; ER 56-59).[4]

These provisions include four noteworthy parts. First, they

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[2] "CR" refers to the docket number in the trial court. "ER" refers to the page number in the Substituted Excerpt of Record in the Ninth Circuit.

[3] The 1987 franchise agreement went into effect January 1, 1988, but is dated September 24, 1987.

[4] This document appears to have been attached to a later franchise agreement.

require each party to promptly pursue all claims -- within 90 days after knowing the facts giving rise to a claim, and in no event later than six months. (ER 56 ¶ A).[5] Second, they require each party to pay its own costs, expenses, and attorney fees. Graham Aff. at 18 (CR 2) (ER 38 ¶ 22(a)).[6] Third, they mutually waive punitive and exemplary damages. Graham Aff. at 19 (CR 2). Finally, they allow each party to litigate, instead of arbitrate, federal statutory claims arising under the PMPA. *Id.* at 18.

The 1987 franchise agreement was set to expire December 31, 1990. In August 1990, before the suit was filed, Franchisor tendered an agreement renewing the franchise for 3 years (January 1, 1991 though December 31, 1993). This 1990 franchise agreement also contained a Resolution of Disputes clause incorporating Procedures for Arbitration. In 1987, this Court had decided *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987). *McMahon* stated that as a general rule, an agreement could require arbitration of federal statutory claims. The 1990 arbitration provisions contained one relevant difference from the 1987 provisions: they dropped the language allowing the parties to litigate PMPA claims. *See* 1990 franchise agreement ¶ 22(a) (ER 38). This effectively required arbitration of those federal statutory claims.

Franchisee eventually moved for a preliminary injunction against termination of the 1990 franchise agreement. Motion (Nov. 25, 1991) (CR 26). Franchisor argued that the case was arbitrable.

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[5] These times correspond to PMPA periods for mandatory equitable relief. *See* 15 U.S.C. § 2805(b)(4) (court may refuse to continue or renew franchise if suit brought over 90 days after notice of termination).

[6] The losing party must pay a variety of arbitration-related expenses. *See* ER 38 ¶ 22(a); ER 58 ¶ I.

Franchisee argued that arbitration agreements are invalid under the PMPA because the PMPA requires a judicial remedy.

The district court ordered Franchisor not to terminate the franchise on the ground that Franchisee could not meet its fuel purchase quota, stated that the Franchisee was required to arbitrate, ordered that the injunction remain in effect until termination pending arbitration, and ordered that the arbitration be completed within 90 days. Order (Dec. 3, 1991) (CR 32; ER 60-61). Nine days later, Franchisee filed a notice of appeal, Notice of Appeal (Dec. 12, 1991) (CR 33; ER 62).

Franchisee did not start an arbitration. After 90 days, Franchisor moved (1) to clarify the injunction to make sure that it could then terminate the franchise, (2) and for summary judgment or entry of judgment because Franchisee had failed to start an arbitration. Motion (March 4, 1992) (CR 35). The district court granted this motion, Civil Minutes (March 12, 1992) (CR 41), and entered judgment. Judgment (Apr. 7, 1992) (CR 42). Franchisee appealed (Apr. 9, 1992).

The two appeals were consolidated, briefed, and argued. On appeal, Franchisee again argued that arbitration agreements are invalid under the PMPA because the PMPA requires a judicial remedy.

On December 16, 1994, the Ninth Circuit panel, in a two-to-one decision, disagreed with Franchisee's argument, but ruled in favor of Franchisee. *Graham Oil Co. v. ARCO Products Co.*, slip op. (9th Cir. Dec. 16, 1994). The ruling was on grounds that had not been briefed. The majority held that three parts of the 1990 arbitration agreement (the mutual waivers of punitive damages, mutual waivers of certain costs and expenses, and the mutually

shortened periods to begin arbitration) contravened the PMPA "because the arbitration clause employed by ARCO compels Graham Oil to surrender important statutorily-mandated rights afforded franchisees by the PMPA." This ruling was not based on an explicit statutory prohibition on waiver, or any explicit statement in the legislative history forbidding waiver.

Then, in Section III.B of its opinion, the majority held that the arbitration clauses were entirely invalid. The majority said that the provisions identified as illegal could not be severed from the remainder of the arbitration clauses because (a) there was no express severability provision, (b) the 1990 agreement was a "contract of adhesion," (c) the Franchisee "would have desired a severability clause" that allowed litigation of PMPA claims, and (d) "the approach most favorable to [Franchisee]" was to sever and invalidate not merely the provisions identified as contrary to the PMPA, but arbitration provisions in their entirety. *See* slip op. at 15519-20.

Franchisor petitioned for rehearing with suggestion of rehearing in banc. On March 13, 1995, the majority amended its opinion by deleting and replacing Section III.B. The new section III.B changed the reasons for invalidating the entire arbitration clause. The amended opinion dropped its statements about: the 1990 agreement being an adhesion contact, what the Franchisee would have desired, and what was most favorable to the Franchisee. Instead, the amended opinion found that the arbitration provisions were "highly integrated," 43 F.3d at 1248; stated that the provisions identified as contravening the PMPA achieved a result "expressly forbidden" by Congress, *id.* at 1249; and found, as a "fact" that Franchisor had deliberately attempted to use an arbitration clause to achieve unlawful goals, thereby tainting the entire arbitration clause. *Id.*

The panel then denied the petition for rehearing. This Petition for a writ of certiorari followed.

Trial court jurisdiction was based on the PMPA, 15 U.S.C. § 2805. Appellate jurisdiction was based on 28 U.S.C. § 1292(a)(1) (for the appeal of the refusal to grant Franchisee's entire injunction) and 28 U.S.C. § 1291 (for the appeal of the final judgment).

ARGUMENT

1. Summary

The majority opinion below decided an important question of federal law -- how to treat an arbitration clause that contains provisions identified as illegal -- in a way that ignores and conflicts with this Court's decision in *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The majority opinion also departed from the accepted and usual course of judicial proceedings (as well as conflicting with controlling cases) in explicitly engaging in fact finding on appeal (and explicitly relying on those findings). Moreover, those findings were made against the party that moved for summary judgment, were related to an issue -- severability of the provisions that offended the majority from the remainder of the arbitration provisions -- that was not raised by Respondent at *any* stage of the case, and were made without notice, so that Petitioner lacked any fair opportunity to introduce evidence on and/or opportunity to brief the issues.

The case also decides an important question of federal law that has not been, but should be, settled by this Court -- whether parties to a franchise agreement governed by the PMPA are *per se* prohibited from mutually waiving some procedures of the PMPA.

The majority opinion in this case has important, widespread results, affecting arbitration clauses in a wide variety of settings.

2. The majority opinion has widespread effect and could invalidate many arbitration clauses in a wide variety of settings.

The majority's reasoning has important implications for all sorts of arbitration agreements. Many arbitration agreements, like the 1990 agreement here, do not mention specific statutes, but are broad enough to cover disputes under potentially any statute. Those statutes may create causes of action, allow punitive or exemplary damages, allow attorney fees, give limitation periods, or create other remedies or procedures. *E.g., Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 223 (1987) (clause requiring arbitration of "any controversy arising out of or relating to my accounts, to transactions with you for me or to this agreement or the breach thereof" covers disputes arising under RICO and federal securities laws).

It is also typical (*i.e.*, not uncommon) for arbitration agreements to include general, procedural provisions that apply to any statute, like the provisions that the majority below found offensive. For example, the American Arbitration Association ("AAA") provides the following as an example of "typical language dealing with fees and expenses":

> All fees and expenses of the arbitration shall be borne by the parties equally. However, each party shall bear the expense of its own counsel, experts, witnesses, and preparation and presentation of proofs.

American Arbitration Association, DRAFTING DISPUTE RESOLUTION CLAUSES: *A Practical Guide* 27 (1992); *see also* American Bar Association Section of Litigation, COMMERCIAL ARBITRATION FOR THE 1990s, 156, ¶ 12(a) (R. Medalie ed. 1991) (arbitration fees split equally, each side pays own attorney fees). This is similar to the mutual waiver of costs and attorney fees that offended the majority below. *Compare id. with* ER 38 ¶ 22(a) ("Each party shall pay its own costs and expenses, including attorneys' fees . . . .").

Likewise, as one "sample[] of clauses dealing with remedies," the AAA includes:

> The arbitrators will have no authority to award punitive damages or any other damages not measured by the prevailing party's actual damages, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of the Agreement.

DRAFTING DISPUTE RESOLUTION CLAUSES at 20. This is similar to the mutual waiver of exemplary and punitive damages that offended the majority below. *Compare id. with* ER 38 ¶ 22(b) ("The arbitrator(s) may not assess punitive or exemplary damages . . . .").

Finally, periods of limitations and repose are likewise not uncommon. *E.g.*, NASD Rules § 15; *PaineWebber Inc. v. Hofmann*, 984 F.2d 1372 (3d Cir. 1993) (applying NASD Rule 15); *Greenwood Int'l, Inc. v. Greenwood Forest Products, Inc.*, 108 Or. App. 74, 814 P.2d 528, *rev. denied*, 312 Or. 150 (1991) (limiting certain claims to three years); *Union County Sch. Dist. No. 1 v. Valley Inland Pacific Constructors, Inc.*, 59 Or. App. 602, 652 P.2d 349 (1982) (limiting claims to those brought within "reasonable time"); COMMERCIAL ARBITRATION FOR THE 1990s, at 156, ¶ 3 (arbitration demand must be made within 30 days of delivery of

goods; arbitration demand must be made within 30 days following architect's decision; demand must be made within reasonable time after claim has arisen, and no later than the date the applicable statute of limitations has run).

These kinds of waivers are mutual in form and in substance. For instance, the waivers in the 1990 franchise agreement had real benefits to Franchisee as well as Franchisor. For instance, the PMPA gives both franchisor and franchisee certain rights to attorney fees. *See* 15 U.S.C. § 2805(d)(1)(B), (d)(3). Both are waived. Also, franchisors have sued franchisees (and others) for false advertising and received large punitive damage awards. *E.g., Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 105 (2d Cir. 1988) (reversing $2 million punitive damages award against franchisee), *cert. denied*, 490 U.S. 1006 (1989); *U-Haul Int'l, Inc., v. Jartran, Inc.*, 793 F.2d 1034, 1037 (9th Cir. 1986) ($20 million punitive damages for false advertising against competitor). The waiver of punitive damages protected Franchisee from this kind of exposure. And the shortened limitations period causes disputes to be resolved before they fester and cause real damage to the parties, such as termination of the franchise relationship.

The remedies or procedures affected by these kinds of provisions could be said to be "important to the effectuation" of policies of any number of statutes. Indeed, the provisions used in this case, as well as the typical provisions cited above, are general enough to apply to any statutory cause of action. Thus, the majority's reasoning implicates, and could easily invalidate, a wide variety of arbitration agreements that contain *any* of these typical waivers. As a result, this case has drawn national press attention, and an amicus attempted to support Petitioner's position in the court of appeals. *See* WALL STREET JOURNAL, Dec. 22, 1994, at B2, cols. 4-6 (discussing case); Motion of Kaiser Foundation Health Plan, Inc. for

Leave to File Letter Brief as Amicus Curiae in Support of ARCO Products' Petition for Rehearing (Jan. 18, 1995).

3. **The majority opinion ignores the *Cone* all-doubts rule, adopting a negative view of arbitration that this Court has rejected.**

In *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), this Court held that section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, creates substantive law, and under that law, all doubts concerning arbitrability must be resolved in favor of arbitration:

> Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. . . . The Arbitration Act establishes that, as a matter of federal law, *any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,* whether the problem at hand is the construction of the contact language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id. at 24-25 (emphasis added).

This Court (and others) have upheld and applied this liberal arbitration policy in a wide variety of settings. For instance this Court has given maximum allowable Constitutional scope to the Federal Arbitration Act, held that state laws are preempted, held that a wide variety of federal statutory claims are arbitrable, and even

explicitly overruled its own anti-arbitration precedent. *E.g., Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. ___, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995) (Federal Arbitration Act applies to maximum extent allowed by Constitution); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (federal statutory ADEA claims are arbitrable); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (federal statutory claims generally arbitrable, including claims under 1934 Securities Exchange Act and RICO).

This policy, and the *Cone* all-doubts rule in particular, do not lose force when considering whether to invalidate an entire arbitration provision. Both the policy and the rule are beyond question. Indeed, the majority below did not question the *Cone* rule. Instead, the majority simply ignored the rule. *See* 43 F.3d at 1248-49. In so doing, it effectively adopted a "negative view of arbitration," *id.* at 1250 (Fernandez, J., dissenting), that contradicts the precedent of this Court (and of the Ninth Circuit itself). *See id.*

The *Cone* "any-doubts" rule takes precedence over, and controls the application of, the rule used by the majority for three reasons. It is based on a statute, the Federal Arbitration Act, not common law. It is specific (directed to arbitration clauses), not general. And it was explicitly chosen by the parties to be used in determining the validity of the arbitration clause. Procedures for Arbitration ¶ G ("Federal law, including the provision of Title 9 of the United States Code, shall govern all issues concerning the validity, enforceability and interpretation of this arbitration agreement.") (ER 58).

When presented with arbitration provisions that are partly

illegal or void, this Court and others do not invalidate arbitration entirely. Rather, they refuse to give effect to the questioned language. For instance, when federal securities or antitrust laws were interpreted as making agreements to arbitrate those claims "void" or unenforceable,[7] courts did not invalidate entire arbitration clauses. Rather, this Court and others held that those claims are non-arbitrable; the remainder of the agreement was valid, and the other claims could be arbitrated.[8] *E.g., Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 217 (1985) (requiring arbitration of non-securities claims); *Lake Communications, Inc. v. ICC Corp.*, 738 F.2d 1473 (9th Cir. 1984) (requiring arbitration of non-antitrust claims). And in *Graham v. Scissor-Tail, Inc.*, 28 Cal.3d 807, 831, 623 P.2d 165, 171 Cal. Rptr. 604 (1981), the court held an arbitration provision specifying a biased arbitrator to be unconscionable and unenforceable, but nonetheless ordered arbitration before an unbiased arbitrator in light of the (state) policy favoring arbitration.

This Court's approach in *Byrd* is consistent with the common-law rule on illegal provisions, also ignored by the majority. The majority below threw out entirely an extensive, mutual, general dispute-resolution mechanism because it decided that a small part of it is "illegal" as applied to some types of PMPA claims by one party. This result overlooks the rule that such clauses are disregarded or

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[7] Of course, under federal pro-arbitration policy those limits on arbitration are no longer good law. *Rodriguez de Quijas*, 490 U.S. 477 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953)); *Nghiem v. NEC Electronics, Inc.*, 25 F.3d 1437, 1441-42 (9th Cir.) (federal antitrust claims arbitrable), *cert. denied*, 115 S.Ct. 638 (1994).

[8] It is noteworthy that Franchisee asserted claims other than claims under the PMPA. Complaint ¶ 2 (CR 1) (ER 2) (pleading claim under state franchise law).

curtailed:

> If an agreement contains an illegal provision that is not central to the agreement and the illegal provision does not involve serious moral turpitude, the illegal portion of the agreement is disregarded and the balance of the agreement is enforceable. . . . Thus, contracts containing illegal covenants not to compete are enforced. The illegal covenant is disregarded or curtailed. Contracts containing illegal penalty clauses or illegal exculpatory clauses are enforced. The illegal clauses are in effect excised.

John D. Calamari & Joseph M. Perillo, THE LAW OF CONTRACTS § 22-2(d), at 893 (3d ed. 1987) (footnotes omitted).

Applying the *Cone* rule, the arbitration provisions here are reasonably and easily construed to allow arbitration. That is done simply by any of four ways: refusing to give the mutual waivers any effect as to PMPA claims, interpreting the arbitration provisions to allow the mutual waivers to be severed from the remainder, limiting the effect of the mutual waivers so that they do not apply to PMPA claims, or construing the provisions to allow the arbitrator to decide the validity of the mutual waivers, *see Snap-On Tools Corp. v. Scott*, [1990-1992 Transfer Binder] Bus. Franchise Guide (CCH) ¶ 9701, at 21,622 (E.D. Mo. 1990) (arbitrator decides whether shortened statute of limitations in franchise agreement is unconscionable); *Lawrence v. Comprehensive Business Serv. Co.*, 833 F.2d 1159 (5th Cir. 1987) (arbitration clause in franchise agreement covered claim of illegality of agreement); *see generally* Appellant's Answering Brief at 20-21 & n.6. So even if the mutual waivers are invalid, the rest of the arbitration provisions must stand under the Federal Arbitration Act and the *Cone* rule.

4. The majority improperly engaged in appellate fact-finding.

In order to reach its result, the majority not only ignored the *Cone* rule, but also had to engage in fact-finding. It was improper for an appellate court to do so. It was doubly improper because Respondent-Appellant had not asked for such findings. And such fact-finding would have been improper at this stage of the case even at the trial court level. Moreover, the majority's findings are clearly wrong.

The majority opinion says that the 1990 arbitration provisions are "a highly integrated unit." 43 F.3d at 1248; *contra id.* at 1251 (offensive provisions are "not intertwined with the arbitration provisions") (Fernandez, J., dissenting).[9] The majority also admittedly makes explicitly "fact" findings on which the majority's result depends:

> *Our decision to strike the entire clause rests in part* upon the *fact* that the offensive provisions clearly represent an attempt by ARCO to achieve through arbitration what

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[9] As Judge Fernandez pointed out:

> Here the contract itself does not provide the specific severance clause that we find in many commercial contracts. Nevertheless, as I see it, the arbitration provision can and does stand up quite well without the offending provisions and would have been acceptable to both parties in that form. I have not the slightest doubt that to the extent arbitration is desirable it would have been just as desirable without those provisions. They are not a sine qua non of arbitral attractiveness and are not intertwined with the arbitration provision. If arbitration is a beauty, it is no less a one because it has lost a slipper. That indicates that arbitration should be required in this case.

Id. at 1251 (Fernandez, J., dissenting).

> Congress has expressly forbidden. Congress enacted the PMPA precisely to prevent the type of agreement that ARCO included in the arbitration clause of its franchise contract. ARCO attempted to use an arbitration clause to achieve its unlawful ends.

43 F.3d at 1249 (emphasis added).

First, it was utterly improper for the Ninth Circuit to make findings on appeal. It is, after all, a "Court of *Appeals*" not of trials. It may not decide factual questions *de novo*. *E.g., Maine v. Taylor*, 477 U.S. 131, 145 (1986) ("As this Court frequently has emphasized, appellate courts are not to decide factual questions *de novo* . . . ."). Of course, an appellate court has some ability to review findings made by the trial court and has some or complete latitude in deciding the legal effect of the empirical facts. But no matter what the standard of review, the appellate court may not engage in empirical fact finding. *E.g., id.* at 144-45. The impropriety of findings at this stage is reinforced by the fact that what purportedly was "clearly" true is not even mentioned in the December slip opinion, did not occur to the trial court (the proper trier of fact), and is the subject of a dissent.

Second, the findings are wrong and unsupported. The statement that Franchisor tried to achieve "what Congress has *expressly forbidden*" is nonsense. Even the majority could find no express prohibition on waiver either in the PMPA or in the legislative history.

Third, the findings are based on nothing more than the "idea that a picaresque oil company wronged its franchisee." 43 F.3d at 1251 (Fernandez, J., dissenting). The "ends" and motivation of Franchisor in modifying the 1987 agreement to remove the PMPA

exclusion were not at issue in any point in this case. The majority's findings are entirely circular, being based on nothing more than the 1990 arbitration provisions themselves. The majority opinion reads as though Franchisor took a clause that required arbitration of PMPA claims and then added "offensive," "illegal" provisions with the goal of stealing Franchisee's rights.

In fact, the opposite is true. The "offensive" provisions are provisions of *general* applicability. They *could not* be aimed at depriving anyone of PMPA rights because they were in the arbitration clause while that clause *excluded* mandatory arbitration of PMPA claims. And there is no evidence that the 1990 removal of the PMPA exception is anything other than taking advantage of this Court's decision in *McMahon*, which made clear that the Federal Arbitration Act makes federal statutory claims presumptively arbitrable.

This appellate fact-finding was doubly improper in light of Respondent's positions on appeal. The thrust of Respondent's appellate argument was that PMPA claims are inherently not arbitrable -- that "there is an 'inherent conflict' between allowing franchisors to insist on arbitration and the underlying purposes of the PMPA." Substituted Appellant's Brief at 23. Although Respondent cited the provisions that the majority found offensive, Respondent did not argue that those provisions alone could cause the arbitration clause to be invalidated. And on the subject of fact-finding by the court, Respondent first took the position that no court fact-findings should be made, *id.* at 22 ("[I]t is not necessary or appropriate to require such findings to be made on a case-by-case basis . . . .") (discussing whether there was an adhesion contract), and then took the position that the Ninth Circuit should remand for findings by the

trial court.[10]

Finally, fact finding against Petitioner would have been improper even at the trial court level at this stage of the case. In opposing arbitration at trial, Respondent had not argued, and offered no evidence about, Franchisor's goals or ends in including the provisions that offended the majority. *See* Plaintiff's Response to Defendant's Opposition to Motion for Preliminary Injunction (Dec. 2, 1991) (CR 29). The trial court entered judgment based on a motion by Petitioner for judgment in its favor, which was partly a motion for summary judgment by Petitioner. It would have been improper to make fact-findings against Petitioner in such a motion.

5. **The PMPA contains no *per se* prohibition on mutual waiver of statutory procedures.**

Congress can and does explicitly forbid waiver of some statutory rights. *Cf., e.g., Wilko v. Swan,* 346 U.S. 427 (1953) (citing explicit federal securities anti-waiver provisions as reason why claims are not arbitrable), *overruled, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989). But the PMPA contains no anti-waiver provision, and the Legislative History does not state that the remedies at issue in this case are important.

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[10] Respondent argued that based on *Gilmer*,

> this court, in *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932 (9th Cir. 1992), remanded and directed the district court to determine whether the arbitration clause was part of a contract of "adhesion." At the very least, the court should require that determination in this case as well.

Appellant's Reply Brief at 6 (footnote omitted).

The general rule is that statutory remedies and procedures *are* waivable, if the waiver is knowing and reasonable. *See, e.g., Golden v. Mobil Oil Corp.*, 882 F.2d 490, 493-94 (11th Cir. 1989) (limitation of liability is not substantively unconscionable); *Amoco Canada Petroleum Co. v. Lakehead Pipe Line Co.*, 618 F.2d 504, 506 (8th Cir. 1980) ("Parties to a contract normally are free to set a limitation period for bringing suit that is shorter than that provided by the applicable statute of limitation; it is only when the contractual limitation period is unreasonably short that it is void as violative of public policy."); *cf. Johnson v. Zerbst*, 304 U.S. 458 (1938) (constitutional right to jury trial may be waived if waiver is knowing and intentional). As noted above, the waivers in this case were mutual in form and in substance.

Moreover, the majority ignores the legislative history and the provisions and effect of the PMPA and state franchise law. It confuses the situation existing prior to the PMPA with the situation that exists today.

Before enactment of the PMPA, Congress felt that "[t]he disparity of bargaining power . . . disadvantage[d] the franchisee in negotiations leading to execution of the franchise agreement." *See* S. Rep. No. 731, 95th Cong., 2d Sess., 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 873, 876 ("Legislative History"), *quoted in part* in slip op. at 15116. The PMPA was designed as "remedying the disparity in bargaining power between franchisors and franchisees." *Id.* at 18, 1978 U.S.C.C.A.N. at 877. An "essential" aim of the PMPA was to give "franchisees meaningful protections from arbitrary or discriminatory terminations and non-renewals" and to allow "fulfillment of the *reasonable renewal expectations* of franchisees." Legislative History at 18, 1978 U.S.C.C.A.N. at 877 (emphasis added).

The PMPA accomplished these goals by, among other things, broadly restricting contract terms and the non-renewal or termination of franchises. *See* 15 U.S.C. §§ 2801-2805. Moreover, in many areas not preempted by federal law, motor-fuel franchises are subject to additional, extensive regulation under state law. *See* Or. Rev. Stat. §§ 650.200-.250 (Oregon Motor Fuel Franchises Act). Thus, in the post-PMPA world, PMPA franchise agreements and relationships are highly regulated and restricted.

Because of the substantive provisions provided by the PMPA, as well provisions of state law, it is illogical to continue to treat PMPA franchisees as if they were minor children. The have enough bargaining power so that there should be no *per se* rule against mutual waiver of the provisions of the PMPA at issue here.

6. **Conclusion**

An entire arbitration agreement generally cannot be invalidated on the grounds that small portions of it contravene a statute. The *Cone* any-doubts rule operates to make those agreements presumptively valid. When the majority below ignored that rule, it decided an important issue of federal law in a manner that conflicted with this Court's controlling precedent. And when the majority reached this result by making findings of fact on appeal, it departed from the accepted and usual course of judicial proceedings, again conflicting with the Court's controlling precedent. This departure was worsened because those findings were made against a party who had no notice that it should be introducing evidence on the issues and because the appellate findings themselves are baseless and wrong.

The majority below also decided an important question of federal law that has not been, but should be, settled by this Court --

waivability of PMPA procedures -- and did so incorrectly.

Therefore, for the reasons stated above this Court should issue a writ of certiorari to the United States Court of Appeals of the Ninth Circuit in order to review this case.

Dated: June 14, 1995.

Charles F. Adams (counsel of record)
Joseph D. Cohen
Randolph C. Foster
Counsel for Peititioner

APPENDIX

Opinion Delivered Upon the Rendering of the Judgment
43 F.3d 1244

GRAHAM OIL CO., an Oregon corporation, Plaintiff-Appellant,
v.
ARCO PRODUCTS CO., A DIVISION OF ATLANTIC RICHFIELD CO., a Delaware corporation, Defendant-Appellee.

Nos. 92-35007, 92-35380.
United States Court of Appeals,
Ninth Circuit.
Argued and Submitted Nov. 2, 1993.
Decided Dec. 16, 1994.
As Amended March 13, 1995.

[*1245] Mildred J. Carmack, Schwabe, Williamson & Wyatt, Portland, OR, for plaintiff-appellant.

Charles F. Adams, Stoel, Rives, Boley, Jones & Grey, Portland, OR, for defendant-appellee.

Appeals from the United States District Court for the District of Oregon.

Before: REINHARDT, BRUNETTI, and FERNANDEZ, Circuit Judges.

Opinion by Judge REINHARDT; Dissent by Judge FERNANDEZ.

REINHARDT, Circuit Judge:

I. INTRODUCTION

Graham Oil Co. ("Graham Oil") appeals the judgment of the district court, which dismissed, with prejudice, all of its claims

against ARCO Products Co. ("ARCO"). The claims were dismissed because Graham Oil [*1246] refused to submit to arbitration as required by an arbitration clause in its distributorship agreement with ARCO.

Graham Oil contends that the arbitration clause is invalid because it requires the surrender of certain rights provided under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806. Accordingly, it argues that the district court--not an arbitrator--must decide the merits of its claims under the PMPA. We agree.

II. FACTS

For nearly forty years, Graham Oil was a branded distributor of ARCO gasoline in Coos Bay, Oregon. On October 2, 1990, Graham Oil and ARCO entered into a Branded Distributor Gasoline Agreement ("Agreement"), which was effective from January 1, 1991, to December 31, 1993. Among other things, the parties agreed that Graham Oil would purchase a minimum amount of gasoline each month during the two-year period of the Agreement.

On November 10, 1991, ARCO notified Graham Oil that it intended to terminate the Agreement as of October 31, 1991, because Graham Oil had not been purchasing the required minimum amount of gasoline as specified in the Agreement. On November 27, 1991, Graham Oil filed a motion for a preliminary injunction against ARCO in federal district court. Graham Oil argued that ARCO had violated the PMPA by deliberately raising its prices so that Graham Oil would be unable to meet the minimum gasoline requirements. Accordingly, Graham Oil argued that ARCO should not be allowed to terminate the Agreement.

On December 3, 1991, the district court issued a preliminary injunction that prohibited ARCO from terminating the Agreement for

90 days. Instead of reaching the merits of Graham Oil's claims under the PMPA, however, the court found that arbitration was Graham Oil's exclusive remedy. The court required the parties to complete the arbitration within 90 days.

Graham Oil appealed the district court's order and refused to submit to arbitration. Upon the expiration of the 90 days, ARCO moved for summary judgment. Graham Oil filed a cross-motion to keep the court's preliminary injunction in force pending the resolution of its appeal. The court denied Graham Oil's cross-motion and granted summary judgment in favor of ARCO. On appeal, Graham Oil argues that the arbitration clause in the Agreement is invalid and that the court must determine the merits of its claims under the PMPA.

III. ANALYSIS

This case involves the validity of an arbitration clause that, in addition to specifying arbitration as the means by which disputes are to be resolved, purports to waive certain statutory rights conferred upon petroleum franchisees by the PMPA. We conclude that the clause is invalid. As a result, we strike it and remand for further proceedings.

A. Validity of the Clause.

1. Purpose of the PMPA. In determining the validity of the arbitration clause, we first review the purpose of the PMPA. Congress enacted the PMPA with the primary goal of "protecting franchisees." *See Khorenian v. Union Oil Co.*, 761 F.2d 533, 535 (9th Cir.1985) (internal quotes omitted). Such protection was needed in order to correct the great "disparity of bargaining power" between petroleum franchisors and franchisees. *See* S.Rep. No. 731, 95th Cong., 2d Sess., *in* 1978 U.S.C.C.A.N. 873, 876 [hereinafter *Legislative History*]. According to the legislative history of the

PMPA, petroleum franchise agreements generally are nothing more than "contracts of adhesion" that perpetuate the "continuing vulnerability of the franchisee to the demands and actions of the franchisor." *Id.*

In order to correct some of the effects of this disparity in bargaining power, Congress enacted certain protections for franchisees like Graham Oil. Essentially, the Act affords franchisees statutory remedies for the arbitrary or discriminatory termination (or non-renewal) of franchises by their franchisors. *Id.* Among other things, these protections include exemplary damages, reasonable attorney's fees, and a one-year statute of limitations. See 15 U.S.C. § 2805; *Legislative History* at 899. These rights and benefits are, of course, not only designed to compensate [*1247] for injury, but also to deter unfair conduct.

2. Arbitration Clause. Turning to the arbitration clause, we note as an initial matter that arbitration is a form of dispute resolution that finds favor in the courts. In a number of instances, the Supreme Court has upheld agreements to submit statutory claims to arbitration, *see, e.g., Gilmer v. Interstate/Johnson Lane Corporation,* 500 U.S. 20, 26, 111 S.Ct. 1647, 1652, 114 L.Ed.2d 26 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the [Federal Arbitration Act, 9 U.S.C. § 2 *et seq.*]."), including claims involving unfair business practices. Among the claims in that category are those arising under the Sherman Act, the Securities Exchange Act of 1934, and the Securities Act of 1933. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). Some of the arbitration provisions--like the provisions

here--have been contained in form agreements executed before the dispute arose. *See, e.g., De Quijas*, 490 U.S. at 478, 109 S.Ct. at 1918; *McMahon*, 482 U.S. at 223, 107 S.Ct. at 2335.

3. Analysis. Nothing in the PMPA suggests that Congress intended to change the general presumption in favor of upholding agreements to submit statutory claims to arbitration. A simple agreement for arbitration of disputes is valid, whether or not contained in a franchise agreement. Such a provision constitutes nothing more than an agreement to substitute one legitimate dispute resolution *forum* for another and involves no surrender of statutory protections or benefits.

However, the fact that franchisees may agree to an arbitral forum for the resolution of statutory disputes in no way suggests that they may be forced by those with dominant economic power to surrender the statutorily- mandated rights and benefits that Congress intended them to possess. This is certainly true in cases arising under the PMPA, which was enacted to shield franchisees from the gross "disparity of bargaining power" that exists between them and franchisors. If franchisees could be compelled to surrender their statutorily-mandated protections as a condition of obtaining franchise agreements, then franchisors could use their superior bargaining power to deprive franchisees of the PMPA's protections. In effect, the franchisors could simply continue their earlier practice of presenting prospective franchisees with contracts of adhesion that deny them the rights and benefits afforded by Congress. In that way, the PMPA would quickly be nullified.

Here, the arbitration clause[1] purports to forfeit certain important statutorily-mandated rights or benefits afforded to Graham Oil and other franchisees by the PMPA. First, the arbitration clause expressly forfeits Graham Oil's statutorily-mandated right to recover exemplary damages from ARCO if Graham Oil prevails on certain

claims. The clause provides that neither party can be awarded exemplary damages. *Compare* 15 U.S.C. § 2805(d)(1)(B) ("If the franchisee prevails in [certain] action[s] ... such franchisee shall be entitled ... *to exemplary damages,* where appropriate...." (emphasis added)) *with* Agreement § 22(b) ("The arbitrator(s) *may not assess* punitive or *exemplary damages*...." (emphasis added)).

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1. The relevant provisions of the arbitration clause are set forth in the Appendix below.

Second, the arbitration clause expressly forfeits Graham Oil's statutorily-mandated right to recover reasonable attorney's fees from ARCO if Graham Oil prevails on certain claims. The clause provides that each party will bear its own attorney's fees. *Compare* 15 U.S.C. § 2805(d)(1)(C) ("If the franchisee prevails in [certain] action[s] ... such franchisee shall be entitled ... to *reasonable attorney* and expert witness *fees* to be paid by the franchisor...." (emphasis added)) *with* Agreement § 22(a) ("*Each party shall pay its own costs and expenses, including attorneys' fees related to such arbitration*...." (emphasis added)).

Third, the arbitration clause expressly forfeits Graham Oil's statutorily-mandated right [*1248] to a one-year statute of limitations on its claims against ARCO. The clause reduces the time in which a claim can be brought from one year to 90 days, or in some cases six months. *Compare* 15 U.S.C. § 2805(a) ("[N]o such action may be maintained unless commenced *within 1 year* after ... the date the franchisor fails to comply with [certain] requirements ... of this title.") *with* Appendix, EXHIBIT E § A ("The party waives the right to seek any relief or pursue any claim not included in an arbitration demand filed ... *within 90 days* following the date the party knew or should have known of the facts giving rise to the claim [and in no event more than six months after the occurrence of the facts giving

rise to the claim]" (emphasis added)).

Each of the three statutory rights is important to the effectuation of the PMPA's policies. The purpose of exemplary damages is to deter franchisors from engaging in improper terminations of franchise agreements. The purpose of attorney's fees is to deter franchisors from improperly contesting meritorious claims. Finally, the purpose of a one-year statute of limitations is to afford franchisees a reasonable period of time in which to seek relief for improper terminations and other abuses by petroleum franchisors. In attempting to strip franchisees of these statutory rights and benefits by means of an arbitration clause included in the franchise agreement, ARCO violated the purpose as well as the specific terms of the PMPA.

Because the arbitration clause employed by ARCO compels Graham Oil to surrender important statutorily-mandated rights afforded franchisees by the PMPA, we hold that the clause contravenes the Act.

B. Severability of the Clause.

Having determined that ARCO's arbitration clause violates federal law, we turn to the question of its severability. "Arbitration clauses [must] be treated as severable from the documents in which they appear unless there is clear intent to the contrary." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 476 (9th Cir.1991), *cert. denied*, --- U.S. ----, 112 S.Ct. 1294, 117 L.Ed.2d 516 (1992). Here, there is no evidence of any contrary intent.[2] More important from a practical standpoint, neither party suggests that if the arbitration clause is unlawful, the entire contract must be invalidated. Accordingly, we conclude that, as in the usual case, the arbitration clause here is severable.

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2. In fact, the franchise agreement expressly states that the entire arbitration

clause--paragraph 22 and Exhibit E--survives the termination or expiration of the agreement. See Appendix ¶ 22(c).

The more difficult question is whether the *entire* arbitration clause should be severed, or simply the provisions pertaining to exemplary damages, attorney's fees, and the statute of limitations. Relying on principles that are analogous to those we use in determining whether a particular clause is severable from an entire contract, we conclude that in this case the *entire* clause must be eliminated.

It is a well-known principle in contract law that a clause cannot be severed from a contract when it is an integrated part of the contract. As one leading treatise has noted, "a contract should be treated as entire when by consideration of its terms, nature and purposes each and all of the parts appear to be interdependent and common to one another." Joseph D. Calamari & Joseph M. Perillo, *Contracts* 478 n. 76 (3d ed. 1987). As we noted in one of our early surveys of contract law, a "contract is entire, and not severable, when, by its terms, nature, and purpose, it contemplates and intends that each and all of its parts, [and] material provisions ... are common to the other, and interdependent." *Hudson v. Wylie*, 242 F.2d 435, 446 (9th Cir.1957).

Here, the offending parts of the arbitration clause do not merely involve a single, isolated provision; the arbitration clause in this case is a highly integrated unit containing three different illegal provisions. Unlike the other clauses, the arbitration clause here includes a [*1249] survival provision that expressly preserves the entire clause in the event the contract is declared invalid. Moreover, it establishes a unified procedure for handling all disputes, and its various unlawful provisions are all a part of that overall procedure. Thus, we conclude that the clause must be treated as a whole and that its various

provisions are not severable.

Our decision to strike the entire clause rests in part upon the fact that the offensive provisions clearly represent an attempt by ARCO to achieve through arbitration what Congress has expressly forbidden. Congress enacted the PMPA precisely to prevent the type of agreement that ARCO included in the arbitration clause of its franchise contract. ARCO attempted to use an arbitration clause to achieve its unlawful ends. Such a blatant misuse of the arbitration procedure serves to taint the entire clause. As a leading treatise notes, severance is inappropriate when the entire clause represents an "integrated scheme to contravene public policy." *See* E. Allan Farnsworth, *Farnsworth on Contracts* § 5.8, at 70 (1990). For the above reasons, we conclude that the entire arbitration clause, and not merely the offensive provisions, must be stricken from the contract. We remand to the district court, which is the proper forum for the resolution of this underlying dispute.

IV. CONCLUSION

The district court improperly dismissed Graham Oil's claims. The arbitration provision contained in the franchise agreement is invalid, and the court--not an arbitrator--must decide the merits of the claims. Accordingly, the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

APPENDIX

BRANDED DISTRIBUTOR GASOLINE STANDARD TERMS AND CONDITIONS

....

22. *Resolution of Disputes*

a) Except as set forth below or where prohibited by applicable law, any dispute or controversy relating to or arising out of the Agreement ... shall be resolved by binding arbitration in accordance with the procedures and rules set forth in Exhibit E attached hereto and incorporated herein. The site of such arbitration shall be set forth in Exhibit E. The decision of the arbitrator(s) shall be final and binding on the parties and access to a judicial forum is foreclosed, except to enforce an arbitral decision or as required by law. Judgment upon the award of the arbitrator(s) may be entered and enforced in any court having jurisdiction thereof. Each party shall pay its own costs and expenses, including attorneys' fees related to such arbitration, except that the cost and expenses of the arbitration association or service utilized, stenographic record, and witnesses and proofs that may have been produced at the direction of the arbitrator(s) shall be paid by the party against whom the decision of the arbitrator(s) is entered and the cost of the arbitrator(s) shall be paid as set forth in the succeeding sentence. If an arbitral panel consists of a single arbitrator, the cost and expenses of the arbitrator shall be paid by the party against whom the decision of the arbitrator is entered; however, if an arbitral panel consists of three arbitrators, the cost and expenses of the two additional arbitrators shall be paid by the party which initially requested three arbitrators; the cost and expenses of any single arbitrator appointed by the arbitration association or service utilized, as set forth in Section F of Exhibit E, before the arbitral panel is selected shall be paid one-half by the plaintiff(s) and one-half by the defendant(s).

b) The arbitrator(s) may not assess punitive or exemplary damages but may award both legal and equitable relief. If the dispute or controversy involves a claim for equitable relief as well as a claim for damages or other legal relief and the arbitrator(s) enter(s) a decision as to the equitable claims before entering a decision as to the legal claims, judgment upon the decision as to the equitable relief may be

immediately entered and enforced in any court having jurisdiction thereof.

c) This Paragraph 22 shall survive termination or expiration of the Agreement as to any claims covered by the Agreement.

* * *

[*1250] EXHIBIT E

PROCEDURES FOR ARBITRATION

A. *INITIATION*

To initiate an arbitration, ARCO or Buyer must file with the arbitration association or service set forth in Section J below (the Association/Service) and send the opposing party at the address specified in the Notices provision of the Agreement by registered or certified mail, return receipt requested, a written arbitration demand. The demand shall set forth a clear and complete statement of the nature of the claim, its basis, the remedy sought, including the amount of damages if any, and whether the party desires a panel consisting of one or three arbitrator(s). The party waives the right to seek any relief or pursue any claim not included in an arbitration demand filed and served within 90 days following the date the party knew or should have known of the facts giving rise to the claim and in no event more than six months after the occurrence of the facts giving rise to the claim in the absence of active fraud or concealment of the facts by the opposing party.

....

FERNANDEZ, Circuit Judge, dissenting:

I agree with the majority that arbitration of PMPA disputes is appropriate. Where we part company is at the point where the majority decides to strike down the arbitration provision in its

entirety because that provision purports to remove some remedies that would otherwise be available under the PMPA.

Graham suggests the court should evince a hostility to arbitration in cases of this type. The majority does not exactly acquiesce, but it does suggest that Graham should not be bound to arbitration at all. Why? The only reason, subliminal as it is, may be that arbitration is such a bad thing for companies like Graham that a few limitations of statutory rights (entirely satellite[1] to any dispute) will taint the whole.

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1. By "satellite" I mean that neither exemplary damages, attorney fees, nor statutes of limitations have anything to do with the arbitrable question--was or was not there a breach of the agreement?

In the past that kind of argument has not carried the day. Neither the Supreme Court nor this court has accepted a negative view of arbitration. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 22-23, 111 S.Ct. 1647, 1651-56, 114 L.Ed.2d 26 (1991); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-27, 107 S.Ct. 2332, 2337-38, 96 L.Ed.2d 185 (1987); *Mago v. Shearson Lehman Hutton, Inc.*, 956 F.2d 932, 934-35 (9th Cir.1992); *Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 286-87 (9th Cir.1988). When it adopted the broad language of the Federal Arbitration Act, Congress also rejected a negative view of arbitration proceedings. *See* 9 U.S.C. §§ 1-16. I do not think we should adopt a negative view at this time.

I will assume, without deciding, that the arbitration provision's removal of attorneys fees and punitive damages and its changing of the date to bring a claim are all provisions which, as a matter of law, cannot be agreed to by these contracting parties. I will also assume that those questions should not be submitted to the arbitrator in the first instance, although I find that question to be a knotty one indeed.

Even given those assumptions, I disagree with the conclusion that the arbitration provision should be stricken in its entirety.

Although we must descry the intent of the parties, I do not agree that we should determine that public policy considerations must lead to a conclusion that Graham (or Congress) would not have wanted arbitration in this case. Rather, we should ask if the improper requirements so permeate the arbitration provision that the whole of it must be stricken. *See, e.g., Sheet Metal Workers' Int'l Ass'n, Local 206 v. R. K. Burner Sheet Metal, Inc.*, 859 F.2d 758, 761 (9th Cir.1988); *National Labor Relations Board v. Southern California Pipe Trades Counsel No. 16*, 449 F.2d 668, 672-73 (9th Cir.1971); *Plumbers and Steamfitters Union v. Dillion*, 255 F.2d [*1251] 820, 823 (9th Cir.1958). That is a much more appropriate index of the intent of the parties, or either of them, than some assumption about what one of the parties might or might not have obtained in some Panglossian world. Who knows what should be assemed in this would? I, for one, think that an assumption that there would have been no arbitration provision at all is unfounded. Reliance upon public policy to say that there should not be one is similarly unfounded.

Here the contract itself does not provide the specific severance clause that we find in many commercial contracts.[2] Nevertheless, as I see it, the arbitration provision can and does stand up quite well without the offending provisions and would have been acceptable to both parties in that form. I have not the slightest doubt that to the extent arbitration is desirable it would have been just as desirable without those provisions. They are not a sine qua non of arbitral attractiveness and are not intertwined with the arbitration provision. If arbitration is a beauty, it is no less a one because it has lost a slipper. That indicates that arbitration should be required in this case.

2. The contract does have a rather ill-written paragraph that might be described as a severance clause. That paragraph provides that "[i]f the Agreement, or any procedure ... shall at any time be in conflict with any legal requirements ... then the Agreement shall immediately become inoperative and ineffective with respect thereto." It then goes on to provide that should that event occur either party may terminate the agreement in its entirety. Para. 20. Whatever one is to think about that paragraph, I would feel somewhat disingenuous were I to assert that *it* resolved the issue in this case. I shall not do so.

Nor do I believe that this blinks at reality. Had the arbitration provision been offered without the offending provisions, Graham would surely have accepted it in that more favorable form. It would have been less favorable to ARCO, but that company would undoubtedly have still offered the provision, even without that which it could not have.

In fine, the parties agreed upon arbitration. Some of the terms they agreed to may not be possible. However, on the whole, arbitration is possible, and the real point of this litigation--should ARCO pay damages for breaching the agreement by mispricing its products--can and should be submitted to the arbitrators, as agreed. Thus, I do not agree that we should elide the arbitration provision and bring the whole of this contractual dispute into the federal courts based upon an idea that a picaresque oil company wronged its franchisee when it asked for arbitration of disputes between them. Arbitration is a favored procedure, and we should favor it here.

Therefore, I respectfully dissent.

ORDER

March 13, 1995

The opinion in this case filed December 16, 1994 shall be amended by deleting Section III.B, which begins on page 15519 and

ends on page 15521, and replacing it with the following:

[Editor's Note: Amendments incorporated for purposes of publication.]

In addition, the dissent, which begins on page 15524 and ends on page 15526, shall be deleted and replaced with the following:

[Editor's Note: Substitution incorporated for purposes of publication.]

Original Ninth Circuit Slip Opinion

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRAHAM OIL CO., an Oregon corporation, Plaintiff-Appellant,

v.

ARCO PRODUCTS CO., a division of Atlantic Richfield Co., a Delaware corporation, Defendant-Appellee.

Nos. 92-35007, 92-35380
D.C. No. 90-06476 JO

OPINION

Appeals from the United States District Court
for the District of Oregon
Robert E. Jones, District Judge, Presiding

Argued and Submitted
November 2, 1993--Portland, Oregon

Filed December 16, 1994

Before: Stephen Reinhardt, Melvin Brunetti,
and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Reinhardt; Dissent by Judge Fernandez

[*15514]

REINHARDT, Circuit Judge:

I. INTRODUCTION

Graham Oil Co. ("Graham Oil") appeals the judgment of the district court, which dismissed, with prejudice, all of its claims against ARCO Products Co. ("ARCO"). The claims were dismissed

because Graham Oil refused to submit to arbitration as required by an arbitration clause in its distributorship agreement with ARCO.

Graham Oil contends that the arbitration clause is invalid because it requires the surrender of certain rights provided under the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806. Accordingly, it argues that the district court -- not an arbitrator -- must decide the merits of its claims under the PMPA. We agree.

II. FACTS

For nearly forty years, Graham Oil was a branded distributor of ARCO gasoline in Coos Bay, Oregon. On October 2, 1990, Graham Oil and ARCO entered into a Branded Distributor Gasoline Agreement ("Agreement"), which was effective from January 1, 1991, to December 31, 1993. Among other things, the parties agreed that Graham Oil would purchase a [*15515] minimum amount of gasoline each month during the two-year period of the Agreement.

On November 10, 1991, ARCO notified Graham Oil that it intended to terminate the Agreement as of October 31, 1991, because Graham Oil had not been purchasing the required minimum amount of gasoline as specified in the Agreement. On November 27, 1991, Graham Oil filed a motion for a preliminary injunction against ARCO in federal district court. Graham Oil argued that ARCO had violated the PMPA by deliberately raising its prices so that Graham Oil would be unable to meet the minimum gasoline requirements. Accordingly, Graham Oil argued that ARCO should not be allowed to terminate the Agreement.

On December 3, 1991, the district court issued a preliminary injunction that prohibited ARCO from terminating the Agreement for 90 days. Instead of reaching the merits of Graham Oil's claims under the PMPA, however, the court found that arbitration was Graham

Oil's exclusive remedy. The court required the parties to complete the arbitration within 90 days.

Graham Oil appealed the district court's order and refused to submit to arbitration. Upon the expiration of the 90 days, ARCO moved for summary judgment. Graham Oil filed a cross-motion to keep the court's preliminary injunction in force pending the resolution of its appeal. The court denied Graham Oil's cross-motion and granted summary judgment in favor of ARCO. On appeal, Graham Oil argues that the arbitration clause in the Agreement is invalid and that the court must determine the merits of its claims under the PMPA.

III. ANALYSIS

This case involves the validity of an arbitration clause that, in addition to specifying arbitration as the means by which disputes are to be resolved, purports to waive certain [*15516] statutory rights conferred upon petroleum franchisees by the PMPA. We conclude that the clause is invalid. As a result, we strike it and remand for further proceedings.

A. Validity of the Clause.

1. Purpose of the PMPA. In determining the validity of the arbitration clause, we first review the purpose of the PMPA. Congress enacted the PMPA with the primary goal of "protecting franchisees." *See Khorenian v. Union Oil Co.*, 761 F.2d 533, 535 (9th Cir. 1985) (internal quotes omitted). Such protection was needed in order to correct the great "disparity of bargaining power" between petroleum franchisors and franchisees. *See* S. Rep. No. 731, 95th Cong., 2d Sess., *in* 1978 U.S.C.C.A.N. 873, 876 [hereinafter *Legislative History*]. According to the legislative history of the PMPA, petroleum franchise agreements generally are nothing more than "contracts of adhesion" that perpetuate the "continuing

vulnerability of the franchisee to the demands and actions of the franchisor." *Id.*

In order to correct some of the effects of this disparity in bargaining power, Congress enacted certain protections for franchisees like Graham Oil. Essentially, the Act affords franchisees statutory remedies for the arbitrary or discriminatory termination (or non-renewal) of franchises by their franchisors. *Id.* Among other things, these protections include exemplary damages, reasonable attorney's fees, and a one-year statute of limitations. See 15 U.S.C. § 2805; *Legislative History* at 899. These rights and benefits are, of course, not only designed to compensate for injury, but also to deter unfair conduct.

2. Arbitration Clause. Turning to the arbitration clause, we note as an initial matter that arbitration is a form of dispute resolution that finds favor in the courts. In a number of instances, the Supreme Court has upheld agreements to submit statutory claims to arbitration, see, e.g., *Gilmer v.* [*15517] *Interstate/Johnson Lane Corporation,* 500 U.S. 20, 26 (1991) ("It is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the [Federal Arbitration Act, 9 U.S.C. § 2 *et seq.*]."), including claims involving unfair business practices. Among the claims in that category are those arising under the Sherman Act, the Securities Exchange Act of 1934, and the Securities Act of 1933. *See, e.g., Rodriguez De Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989); *Shearson/American Express Inc. v. McMahon,* 482 U.S. 220 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985). Some of the arbitration provisions -- like the provisions here -- have been contained in form agreements executed before the dispute arose. *See, e.g., De Quijas,* 490 U.S. at 478; *McMahon,* 482 U.S. at 223.

3. Analysis. Nothing in the PMPA suggests that Congress

intended to change the general presumption in favor of upholding agreements to submit statutory claims to arbitration. A simple agreement for arbitration of disputes is valid, whether or not contained in a franchise agreement. Such a provision constitutes nothing more than an agreement to substitute one legitimate dispute resolution *forum* for another and involves no surrender of statutory protections or benefits.

However, the fact that franchisees may agree to an arbitral forum for the resolution of statutory disputes in no way suggests that they may be forced by those with dominant economic power to surrender the statutorily-mandated rights and benefits that Congress intended them to possess. This is certainly true in cases arising under the PMPA, which was enacted to shield franchisees from the gross "disparity of bargaining power" that exists between them and franchisors. If franchisees could be compelled to surrender their statutorily-mandated protections as a condition of obtaining franchise agreements, then franchisors could use their superior bargaining power to deprive franchisees of the PMPA's protections. In effect, the franchisors could simply continue their earlier [*15518] practice of presenting prospective franchisees with contracts of adhesion that deny them the rights and benefits afforded by Congress. In that way, the PMPA would quickly be nullified.

Here, the arbitration clause[1] purports to forfeit certain important statutorily-mandated rights or benefits afforded to Graham Oil and other franchisees by the PMPA. First, the arbitration clause expressly forfeits Graham Oil's statutorily-mandated right to recover exemplary damages from ARCO if Graham Oil prevails on certain claims. The clause provides that neither party can be awarded exemplary damages. *Compare* 15 U.S.C. § 2805(d)(1)(B) ("If the franchisee prevails in [certain] action[s] . . . such franchisee shall be entitled . . . *to exemplary damages*, where appropriate . . . ." (emphasis added)) with Agreement § 22(b) ("The arbitrator(s) *may not assess* punitive

or *exemplary* damages . . . ." (emphasis added)).

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1. The relevant provisions of the arbitration clause are set forth in the Appendix below.

Second, the arbitration clause expressly forfeits Graham Oil's statutorily-mandated right to recover reasonable attorney's fees from ARCO if Graham Oil prevails on certain claims. The clause provides that each party will bear its own attorney's fees. *Compare* 15 U.S.C. § 2805(d)(1)(C) ("If the franchisee prevails in [certain] action[s] . . . such franchisee shall be entitled . . . to *reasonable attorney* and expert witness *fees* to be paid by the franchisor . . . ." (emphasis added)) with Agreement § 22(a) ("*Each party shall pay its own costs and expenses, including attorneys' fees related to such arbitration* . . . ." (emphasis added)).

Third, the arbitration clause expressly forfeits Graham Oil's statutorily-mandated right to a one-year statute of limitations on its claims against ARCO. The clause reduces the time in which a claim can be brought from one year to 90 days, or in some cases six months. *Compare* 15 U.S.C.S 2805(a) [*15519] ("[N]o such action may be maintained unless commenced *within 1 year* after . . . the date the franchisor fails to comply with [certain] requirements . . . of this title.") *with* Appendix, EXHIBIT E § A ("The party waives the right to seek any relief or pursue any claim not included in an arbitration demand filed . . . *within 90 days* following the date the party knew or should have known of the facts giving rise to the claim [and in no event more than six months after the occurrence of the facts giving rise to the claim]" (emphasis added)).

Each of the three statutory rights is important to the effectuation of the PMPA's policies. The purpose of exemplary damages is to deter franchisors from engaging in improper terminations of franchise

agreements. The purpose of attorney's fees is to deter franchisors from improperly contesting meritorious claims. Finally, the purpose of a one-year statute of limitations is to afford franchisees a reasonable period of time in which to seek relief for improper terminations and other abuses by petroleum franchisors. In attempting to strip franchisees of these statutory rights and benefits by means of an arbitration clause included in the franchise agreement, ARCO violated the purpose as well as the specific terms of the PMPA.

Because the arbitration clause employed by ARCO compels Graham Oil to surrender important statutorily-mandated rights afforded franchisees by the PMPA, we hold that the clause contravenes the Act.

B. Severability of the Clause.

Having determined that ARCO's arbitration clause violates federal law, we turn to the question of its severability. "Arbitration clauses [must] be treated as severable from the documents in which they appear unless there is clear intent to the contrary." *Republic of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 476 (9th Cir. 1991), *cert. denied*, 112 S. Ct. [*15520] 1294 (1992). Here, there is no evidence of any contrary intent.[2] More important from a practical standpoint, neither party suggests that if the arbitration clause is unlawful, the entire contract must be invalidated. Accordingly, we conclude that, as in the usual case, the arbitration clause here is severable.

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2 In fact, the franchise agreement expressly states that the entire arbitration clause -- paragraph 22 and Exhibit E -- survives the termination of expiration of the agreement. See Appendix ¶ 22(c).

The more difficult question is whether the entire arbitration

clause should be severed, or simply the provisions pertaining to exemplary damages, attorney's fees, and the statute of limitations. Normally, in deciding issues pertaining to severability, we look to the "intent and actions of the contracting parties." *See In re Quintex Entertainment,* 950 F.2d 1492, 1496 (9th Cir. 1991). Such an approach is appropriate whenever the parties have roughly equal bargaining power and can freely negotiate the terms of their agreement.

Here, we apply a somewhat different rule. Contracts of adhesion must be "strictly construed" against the drafter. *See, e.g., All Pacific Trading, Inc. v. Vessel M/V Hanjin Yosu,* 7 F.3d 1427, 1431 (9th Cir. 1993) (bills of lading), *cert. denied,* 114 S. Ct. 1301 (1994); *Hydro Systems, Inc. v. Continental Ins. Co.,* 929 F.2d 472, 474 (9th Cir. 1991) (insurance agreements). In construing a contract of adhesion, we look to the presumed intent of the party that lacks bargaining power; we then adopt the construction most favorable to it. While this case does not present the ordinary question -- how to interpret an ambiguous term -- we use a similar mode of analysis. "Strictly construing" the agreement against the drafter, we must determine what approach to severability the franchisee would have sought had it been able to bargain freely with the franchisor. Put another way, we must select the severability approach most favorable to the franchisee. Here, we conclude that the franchisee would have desired a severability clause that accomplishes precisely what Graham Oil seeks to achieve [*15521] in this lawsuit. It would have wanted not only to retain the rights that Congress intended it to have, but also the option to utilize a judicial forum, as the PMPA provides. *See* 15 U.S.C. § 2805. Because the PMPA was enacted for the benefit of franchisees, we cannot presume that they would favor a modification of the procedures contained in that act, absent clear evidence to the contrary. Here, there is no contrary evidence. Thus, the approach most favorable to Graham Oil is to sever the entire

arbitration clause.[3] Accordingly, we hold that the ARCO arbitration clause is invalid and that the district court is the proper forum for the resolution of the underlying dispute.

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3 We note that the offending part of the arbitration clause did not merely involve a single, isolated provision. Rather, it involved a series of three provisions. We note further that the arbitration clause in this case is a highly integrated unit. Unlike the other clauses, the arbitration clause contains a survival provision that expressly preserves the entire clause in the event the contract is declared invalid. These observations support our conclusion that the entire arbitration clause must be severed.

IV. CONCLUSION

The district court improperly dismissed Graham Oil's claims. The arbitration provision contained in the franchise agreement is invalid, and the court -- not an arbitrator -- must decide the merits of the claims. Accordingly, the judgment is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

[*15522] APPENDIX

BRANDED DISTRIBUTOR GASOLINE STANDARD TERMS AND CONDITIONS

. . . .

22. *Resolution of Disputes*

a) Except as set forth below or where prohibited by applicable law, any dispute or controversy relating to or arising out of the Agreement . . . shall be resolved by binding arbitration in accordance with the procedures and rules set forth in Exhibit E attached hereto and incorporated herein. The site of such arbitration shall be set forth in

Exhibit E. The decision of the arbitrator(s) shall be final and binding on the parties and access to a judicial forum is foreclosed, except to enforce an arbitral decision or as required by law. Judgment upon the award of the arbitrator(s) may be entered and enforced in any court having jurisdiction thereof. Each party shall pay its own costs and expenses, including attorneys' fees related to such arbitration, except that the cost and expenses of the arbitration association or service utilized, stenographic record, and witnesses and proofs that may have been produced at the direction of the arbitrator(s) shall be paid by the party against whom the decision of the arbitrator(s) is entered and the cost of the arbitrator(s) shall be paid as set forth in the succeeding sentence. If an arbitral panel consists of a single arbitrator, the cost and expenses of the arbitrator shall be paid by the party against whom the decision of the arbitrator is entered; however, if an arbitral panel consists of three arbitrators, the cost and expenses of the two additional arbitrators shall be paid by the party which initially requested three arbitrators; the cost and expenses of any single arbitrator appointed by the arbitration association or service utilized, as set forth in Section F of Exhibit E, before the arbitral panel is selected shall be paid one-half by the plaintiff(s) and one-half by the defendant(s).

b) The arbitrator(s) may not assess punitive or exemplary damages but may award both legal and equitable relief. If the [*15523] dispute or controversy involves a claim for equitable relief as well as a claim for damages or other legal relief and the arbitrator(s) enter(s) a decision as to the equitable claims before entering a decision as to the legal claims, judgment upon the decision as to the equitable relief may be immediately entered and enforced in any court having jurisdiction thereof.

c) This Paragraph 22 shall survive termination or expiration of the Agreement as to any claims covered by the Agreement.

* * *

EXHIBIT E

PROCEDURES FOR ARBITRATION

A. *INITIATION*

To initiate an arbitration, ARCO or Buyer must file with the arbitration association or service set forth in Section J below (the Association/Service) and send the opposing party at the address specified in the Notices provision of the Agreement by registered or certified mail, return receipt requested, a written arbitration demand. The demand shall set forth a clear and complete statement of the nature of the claim, its basis, the remedy sought, including the amount of damages if any, and whether the party desires a panel consisting of one or three arbitrator(s). The party waives the right to seek any relief or pursue any claim not included in an arbitration demand filed and served within 90 days following the date the party knew or should have known of the facts giving rise to the claim and in no event more than six months after the occurrence of the facts giving rise to the claim in the absence of active fraud or concealment of the facts by the opposing party.

. . . .

[*15524] FERNANDEZ, Circuit Judge, dissenting:

I agree with the majority that arbitration of PMPA disputes is appropriate. Where we part company is at the point where the majority decides to strike down the arbitration provision in its entirety because that provision purports to remove some remedies that would otherwise be available under the PMPA.

Graham suggests the court should evince a hostility to

arbitration in cases of this type. The majority does not exactly acquiesce, but it does suggest that Graham would not have wanted arbitration at all. Why? The only reason, subliminal as it is, may be that arbitration is a bad thing for companies like Graham.

In the past that kind of argument has not carried the day. Neither the Supreme Court nor this court has accepted a negative view of arbitration. *See, e.g., Gilmer v. Interstate/Johnson Lane Corp,* 500 U.S. 20, ___, 111 S. Ct. 1647, 1651-56, 114 L. Ed. 2d 26 (1991); *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 226-27, 107 S. Ct. 2332, 2337-38, 96 L. Ed. 2d 185 (1987); *Mago v. Shearson Lehman Hutton, Inc.,* 956 F.2d 932, 934-35 (9th Cir. 1992); *Cohen v. Wedbush, Noble, Cooke, Inc.,* 841 F.2d 282, 286-87 (9th Cir. 1988). When it adopted the broad language of the Federal Arbitration Act, Congress also rejected a negative view of arbitration proceedings. *See* 9 U.S.C. §§ 1-16. I do not think we should adopt a negative view at this time.

I will assume, without deciding, that the arbitration provision's removal of attorneys fees and punitive damages and its changing of the date to bring a claim are all provisions which, as a matter of law, cannot be agreed to by these contracting parties. I will also assume that those questions should not be submitted to the arbitrator in the first instance, although I find that question to be a knotty one indeed. Even given those assumptions, I disagree with the conclusion that the arbitration provision should be stricken in its entirety.

[*15525] I simply do not accept the notion that, given a chance, Graham would certainly eschew arbitration, or for that matter that what Graham would do is the point. Rather, we should ask if the improper requirements so permeate the arbitration provision that the whole of it must be stricken. *See, e.g., Sheet Metal Workers' Int'l Ass'n, Local 206 v. R. K. Burner Sheet Metal, Inc.,* 859 F.2d 758, 761 (9th Cir. 1988); *National Labor Relations Board v. Southern*

California Pipe Trades Counsel No. 16, 449 F.2d 668, 672-73 (9th Cir. 1971); *Plumbers and Steamfitters Union v. Dillion*, 255 F.2d 820, 823 (9th Cir. 1958). That is a much more appropriate index of the intent of the parties, or either of them, than some assumption about what one of the parties might or might not have obtained in some Panglossian world. Who knows what should be assumed in this world? I, for one, think that an assumption that there would have been no arbitration provision at all is unfounded.

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1 The contract does have a rather ill-written paragraph that might be described as a severance clause. That paragraph provides that "[i]f the Agreement, or any procedure . . . shall at any time be in conflict with any legal requirements . . . then the Agreement shall immediately become inoperative and ineffective with respect thereto. " It then goes on to provide that should that event occur either party may terminate the agreement in its entirety. Para. 20. Whatever one is to think about that paragraph, I would feel somewhat disingenuous were I to assert that *it* resolved the issue in this case. I shall not do so.

Here the contract itself does not provide the specific severance clause that we find in many commercial contracts.[1] Nevertheless, as I see it, the arbitration provision can and does stand up quite well without the offending provisions and would have been acceptable to both parties in that form. I have not the slightest doubt that to the extent arbitration is desirable it would have been just as desirable without those provisions. They are not a sine qua non of arbitral attractiveness and are not intertwined with the arbitration provision. If arbitration is a beauty, it is no less a one because it has lost [*15526] a slipper. That indicates that arbitration should be required in this case.

Nor do I believe that this blinks at reality. Had the arbitration provision been offered without the offending provisions, Graham would surely have accepted it in that more favorable form. It would have been less favorable to ARCO, but that company would

undoubtedly have still offered the provision, even without that which it could not have.

In fine, the parties agreed upon arbitration. Some of the terms they agreed to may not be possible. However, on the whole, arbitration is possible, and the real point of this litigation -- should ARCO pay damages for breaching the agreement by mispricing its products -- can and should be submitted to the arbitrators, as agreed. Thus, I do not agree that we should elide the arbitration provision and bring the whole of this contractual dispute into the federal courts based upon an idea that a picaresque oil company wronged its franchisee when it asked for arbitration of disputes between them. Arbitration is a favored procedure, and we should favor it here.

Therefore, I respectfully dissent.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GRAHAM OIL CO., an Oregon corporation, Plaintiff-Appellant,

v.

ARCO PRODUCTS CO., a division of Atlantic Richfield Co., a Delaware corporation, Defendant-Appellee.

Nos. 92-35007, 92-35380

MARCH 16, 1995

ORDER

Before: REINHARDT, BRUNETTI, and FERNANDEZ, Circuit Judges

The panel has voted to deny appellee's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for reheating en banc is rejected.

Federal Arbitration Act, 9 U.S.C. § 2

§ 2. Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

PMPA, 15 U.S.C. §§ 2801-2806

§ 2801. Definitions

As used in this title:

(1) (A) The term "franchise" means any contract--

(i) between a refiner and a distributor,

(ii) between a refiner and a retailer,

(iii) between a distributor and another distributor, or

(iv) between a distributor and a retailer,

under which a refiner or distributor (as the case may be) authorizes or permits a retailer or distributor to use, in connection with the sale, consignment, or distribution of motor fuel, a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such use.

(B) The term "franchise" includes--

(i) any contract under which a retailer or distributor (as the case may be) is authorized or permitted to occupy leased marketing premises, which premises are to be employed in connection with the sale, consignment, or distribution of motor fuel under a trademark which is owned or controlled by such refiner or by a refiner which supplies motor fuel to the distributor which authorizes or permits such occupancy;

(ii) any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed--

(I) under a trademark owned or controlled by a refiner; or

(II) under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned or controlled on such date by a refiner; and

(iii) the unexpired portion of any franchise, as defined by the preceding provisions of this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) The term "franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor fuel under a franchise.

(3) The term "franchisor" means a refiner or distributor (as the case may be) who authorizes or permits, under a franchise, a retailer or distributor to use a trademark in connection with the sale, consignment, or distribution of motor fuel.

(4) The term "franchisee" means a retailer or distributor (as the case may be) who is authorized or permitted, under a franchise, to use a

trademark in connection with the sale, consignment, or distribution of motor fuel.

(5) The term "refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

(6) The term "distributor" means any person, including any affiliate of such person, who--

(A) purchases motor fuel for sale, consignment, or distribution to another; or

(B) receives motor fuel on consignment for consignment or distribution to his own motor fuel accounts or to accounts of his supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier.

(7) The term "retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(8) The term "marketing premises" means, in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment, or distribution of motor fuel.

(9) The term "leased marketing premises" means marketing premises owned, leased, or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment, or distribution of motor fuel.

(10) The term "contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(11) The term "trademark" means any trademark, trade name, service mark, or other identifying symbol or name.

(12) The term "motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads, and highways.

(13) The term "failure" does not include--

(A) any failure which is only technical or unimportant to the franchise relationship;

(B) any failure for a cause beyond the reasonable control of the franchisee; or

(C) any failure based on a provision of the franchise which is illegal or unenforceable under the law of any State (or subdivision thereof).

(14) The terms "fail to renew" and "nonrenewal" mean, with respect to any franchise relationship, a failure to reinstate, continue, or extend the franchise relationship--

(A) at the conclusion of the term, or on the expiration date, stated in the relevant franchise;

(B) at any time, in the case of the relevant franchise which does not state a term of duration or an expiration date; or

(C) following a termination (on or after the date of enactment of this Act [enacted June 19, 1978]) of the relevant franchise which was entered into prior to such date of enactment and has not been renewed after such date.

(15) The term "affiliate" means any person who (other than by means of a franchise) controls, is controlled by, or is under common control with, any other person.

(16) The term "relevant geographic market area" includes a State or

a standard metropolitan statistical area as periodically established by the Office of Management and Budget.

(17) The term "termination" includes cancellation.

(18) The term "commerce" means any trade, traffic, transportation, exchange, or other commerce--

(A) between any State and any place outside of such State; or

(B) which affects any trade, transportation, exchange, or other commerce described in subparagraph (A).

(19) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, and any other commonwealth, territory, or possession of the United States.

§ 2802. Franchise relationship

(a) General prohibition against termination or nonrenewal. Except as provided in subsection (b) and section 103 [15 U.S.C. § 2803(b)], no franchisor engaged in the sale, consignment, or distribution of motor fuel in commerce may--

(1) terminate any franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]) prior to the conclusion of the term, or the expiration date, stated in the franchise; or

(2) fail to renew any franchise relationship (without regard to the date on which the relevant franchise was entered into or renewed).

(b) Precondition and grounds for termination or nonrenewal.

(1) Any franchisor may terminate any franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]) or may fail to renew any franchise relationship, if--

(A) the notification requirements of section 104 [15 U.S.C. § 2804] are met; and

(B) such termination is based upon a ground described in paragraph (2) or such nonrenewal is based upon a ground described in paragraph (2) or (3).

(2) For purposes of this subsection, the following are grounds for termination of a franchise or nonrenewal of a franchise relationship:

(A) A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure--

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a) [15 U.S.C. § 2804(a)]; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 U.S.C. § 2804(b)(1)].

(B) A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if--

(i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and

(ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 104 [15 U.S.C. § 2804].

(C) The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event

occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence--

(i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 104(a) [15 U.S.C. § 2804(a)]; or

(ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 104(b)(1) [15 U.S.C. § 2804(b)(1)].

(D) An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if--

(i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;

(ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 104(d) [15 U.S.C. § 2804(d)]; and

(iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

(E) In the case of any franchise entered into prior to the date of the enactment of this Act [enacted June 19, 1978], and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises

are located, if--

(i) such determination--

(I) was made after the date such franchise was entered into or renewed, and

(II) was based upon the occurrence of changes in relevant facts and circumstances after such date;

(ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises--

(I) the franchisor, during the 180-day period after notification was given pursuant to section 104 [15 U.S.C. § 2804], either made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor's interest in such premises; or

(II) in the case of the sale, transfer, or assignment to another person of the franchisor's interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor's interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

(3) For purposes of this subsection, the following are grounds for nonrenewal of a franchise relationship:

(A) The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if--

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor's insistence upon such changes or additions for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for the benefit of the franchisor or otherwise preventing the renewal of the franchise relationship.

(B) The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee's operation of the marketing premises, if--

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

(C) A failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures.

(D) In the case of any franchise entered into prior to the date of the enactment of this Act [enacted June 19, 1978] (the unexpired term of which, on such date of enactment, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date

(the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if--

(i) such determination is--

(I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(II) to materially alter, add to, or replace such premises,

(III) to sell such premises, or

(IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;

(ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor's own account; and

(iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 104 [15 U.S.C. § 2804], either--

(I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor's interests in such premises; or

(II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor's interest in such premises.

(c) Definition. As used in subsection (b)(2)(C), the term "an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise

relationship is reasonable" includes events such as--

(1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;

(2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;

(3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;

(4) loss of the franchisor's right to grant possession of the leased marketing premises through expiration of an underlying lease, if--

(A) the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise--

(i) of the duration of the underlying lease; and

(ii) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);

(B) during the 90-day period after notification was given pursuant to section 104 [15 U.S.C. § 2804], the franchisor offers to assign to the franchisee any option to extend the underlying lease or option to purchase the marketing premises that is held by the franchisor, except that the franchisor may condition the assignment upon receipt by the franchisor of--

(i) an unconditional release executed by both the landowner and the franchisee releasing the franchisor from any and all liability accruing after the date of the assignment for--

(I) financial obligations under the option (or the resulting extended lease or purchase agreement);

(II) environmental contamination to (or originating from) the marketing premises; or

(III) the operation or condition of the marketing premises; and

(ii) an instrument executed by both the landowner and the franchisee that ensures the franchisor and the contractors of the franchisor reasonable access to the marketing premises for the purpose of testing for and remediating any environmental contamination that may be present at the premises; and

(C) in a situation in which the franchisee acquires possession of the leased marketing premises effective immediately after the loss of the right of the franchisor to grant possession (through an assignment pursuant to subparagraph (B) or by obtaining a new lease or purchasing the marketing premises from the landowner), the franchisor (if requested in writing by the franchisee not later than 30 days after notification was given pursuant to section 104 [15 U.S.C. § 2804]), during the 90-day period after notification was given pursuant to section 104 [15 U.S.C. § 2804]--

(i) made a bona fide offer to sell, transfer, or assign to the franchisee the interest of the franchisor in any improvements or equipment located on the premises; or

(ii) if applicable, offered the franchisee a right of first refusal (for at least 45 days) of an offer, made by another person, to purchase the interest of the franchisor in the improvements and equipment.

(5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;

(6) loss of the franchisor's right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or

other fault or negligence is related to action taken in bad faith by the franchisor;

(7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;

(8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;
(9) failure by the franchisee to operate the marketing premises for--

(A) 7 consecutive days, or

(B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;

(10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;

(11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and

(12) conviction of the franchisee of any felony involving moral turpitude.

(d) Compensation, etc., for franchisee upon condemnation or destruction of marketing premises. In the case of any termination of a franchise (entered into or renewed on or after the date of enactment of this Act [enacted June 19, 1978]), or in the case of any nonrenewal of a franchise relationship (without regard to the date on which such franchise relationship was entered into or renewed)--

(1) if such termination or nonrenewal is based upon an event described in subsection (c)(5), the franchisor shall fairly apportion between the franchisor and the franchisee compensation, if any, received by the franchisor based upon any loss of business opportunity or good will; and

(2) if such termination or nonrenewal is based upon an event described in subsection (c)(7) and the leased marketing premises are subsequently rebuilt or replaced by the franchisor and operated under a franchise, the franchisor shall, within a reasonable period of time, grant to the franchisee a right of first refusal of the franchise under which such premises are to be operated.

§ 2803. Trial and interim franchises

(a) Nonapplicability of statutory nonrenewal provisions. The provisions of section 102 [15 U.S.C. § 2802] shall not apply to the nonrenewal of any franchise relationship--

(1) under a trial franchise; or

(2) under an interim franchise.

(b) Definitions. For purposes of this section--

(1) The term "trial franchise" means any franchise--

(A) which is entered into on or after the date of enactment of this Act [enacted June 19, 1978];

(B) the franchisee of which has not previously been a party to a franchise with the franchisor;

(C) the initial term of which is for a period of not more than 1 year; and

(D) which is in writing and states clearly and conspicuously--

(i) that the franchise is a trial franchise;

(ii) the duration of the initial term of the franchise;

(iii) that the franchisor may fail to renew the franchise relationship at the conclusion of the initial term stated in the franchise by notifying the franchisee, in accordance with the provisions of section

104 [15 U.S.C. § 2804], of the franchisor's intention not to renew the franchise relationship; and

(iv) that the provisions of section 102 [15 U.S.C. § 2802], limiting the right of a franchisor to fail to renew a franchise relationship, are not applicable to such trial franchise.

(2) The term "trial franchise" does not include any unexpired period of any term of any franchise (other than a trial franchise, as defined by paragraph (1)) which was transferred or assigned by a franchisee to the extent authorized by the provisions of the franchise or any applicable provision of State law which permits such transfer or assignment, without regard to any provision of the franchise.

(3) The term "interim franchise" means any franchise--

(A) which is entered into on or after the date of the enactment of this Act [enacted June 19, 1978];

(B) the term of which, when combined with the terms of all prior interim franchises between the franchisor and the franchisee, does not exceed 3 years;

(C) the effective date of which occurs immediately after the expiration of a prior franchise, applicable to the marketing premises, which was not renewed if such nonrenewal--

(i) was based upon a determination described in section 102(b)(2)(E) [15 U.S.C. § 2802(b)(2)(E)], and

(ii) the requirements of section 102(b)(2)(E) [15 U.S.C. § 2802(b)(2)(E)] were satisfied; and

(D) which is in writing and states clearly and conspicuously--

(i) that the franchise is an interim franchise;

(ii) the duration of the franchise; and

(iii) that the franchisor may fail to renew the franchise at the conclusion of the term stated in the franchise based upon a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located if the requirements of section 102(b)(2)(E)(ii) and (iii) [15 U.S.C. § 2802(b)(2)(E)(ii) and (iii)] are satisfied.

(c) Nonrenewal upon meeting statutory notification requirements. If the notification requirements of section 104 [15 U.S.C. § 2804] are met, any franchisor may fail to renew any franchise relationship--

(1) under any trial franchise, at the conclusion of the initial term of such trial franchise; and

(2) under any interim franchise, at the conclusion of the term of such interim franchise, if--

(A) such nonrenewal is based upon a determination described in section 102(b)(2)(E) [15 U.S.C. § 2802(b)(2)(E); and

(B) the requirements of section 102(b)(2)(E)(ii) and (iii) [15 U.S.C. § 2802(b)(2)(E)(ii) and (iii)] are satisfied.

§ 2804. Notification of termination or nonrenewal of franchise relationship

(a) General requirements applicable to franchisor. Prior to termination of any franchise or nonrenewal of any franchise relationship, the franchisor shall furnish notification of such termination or such nonrenewal to the franchisee who is a party to such franchise or such franchise relationship--

(1) in the manner described in subsection (c); and

(2) except as provided in subsection (b), not less than 90 days prior

to the date on which such termination or nonrenewal takes effect.

(b) Additional requirements applicable to franchisor.

(1) In circumstances in which it would not be reasonable for the franchisor to furnish notification, not less than 90 days prior to the date on which termination or nonrenewal takes effect, as required by subsection (a)(2)--

(A) such franchisor shall furnish notification to the franchisee affected thereby on the earliest date on which furnishing of such notification is reasonably practicable; and

(B) in the case of leased marketing premises, such franchisor--

(i) may not establish a new franchise relationship with respect to such premises before the expiration of the 30-day period which begins--

(I) on the date notification was posted or personally delivered, or

(II) if later, on the date on which such termination or nonrenewal takes effect; and

(ii) may, if permitted to do so by the franchise agreement, repossess such premises and, in circumstances under which it would be reasonable to do so, operate such premises through employees or agents.

(2) In the case of any termination of any franchise or any nonrenewal of any franchise relationship pursuant to the provisions of section 102(b)(2)(E) or section 103(c)(2) [15 U.S.C. §§ 2802(b)(2)(E) or 2803(c)(2)], the franchisor shall--

(A) furnish notification to the franchisee not less than 180 days prior to the date on which such termination or nonrenewal takes effect; and (B) promptly provide a copy of such notification, together with a plan describing the schedule and conditions under

which the franchisor will withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area, to the Governor of each State which contains a portion of such area.

(c) Manner and form of notification. Notification under this section--

(1) shall be in writing;

(2) shall be posted by certified mail or personally delivered to the franchisee; and

(3) shall contain--

(A) a statement of intention to terminate the franchise or not to renew the franchise relationship, together with the reasons therefor;

(B) the date on which such termination or nonrenewal takes effect; and

(C) the summary statement prepared under subsection (d).

(d) Preparation, publication, etc., of statutory summaries.

(1) Not later than 30 days after the date of enactment of this Act [enacted June 19, 1978], the Secretary of Energy shall prepare and publish in the Federal Register a simple and concise summary of the provisions of this title, including a statement of the respective responsibilities of, and the remedies and relief available to, any franchisor and franchisee under this title.

(2) In the case of summaries required to be furnished under the provisions of section 102(b)(2)(D) [15 U.S.C. § 2802(b)(2)(D)] or subsection (c)(3)(C) of this section before the date of publication of such summary in the Federal Register, such summary may be furnished not later than 5 days after it is so published rather than at the time required under such provisions.

§ 2805. Enforcement provisions

(a) Maintenance of civil action by franchisee against franchisor; jurisdiction and venue; time for commencement of action. If a franchisor fails to comply with the requirements of section 102 or 103 [15 U.S.C. §§ 2802 or 2803], the franchisee may maintain a civil action against such franchisor. Such action may be brought, without regard to the amount in controversy, in the district court of the United States in any judicial district in which the principal place of business of such franchisor is located or in which such franchisee is doing business, except that no such action may be maintained unless commenced within 1 year after the later of--

(1) the date of termination of the franchise or nonrenewal of the franchise relationship; or

(2) the date the franchisor fails to comply with the requirements of section 102 or 103 [15 U.S.C. §§ 2802 or 2803].

(b) Equitable relief by court; bond requirements; grounds for nonexercise of court's equitable powers.

(1) In any action under subsection (a), the court shall grant such equitable relief as the court determines is necessary to remedy the effects of any failure to comply with the requirements of section 102 or 103 [15 U.S.C. §§ 2802 or 2803], including declaratory judgment, mandatory or prohibitive injunctive relief, and interim equitable relief. (2) Except as provided in paragraph (3), in any action under subsection (a), the court shall grant a preliminary injunction if--

(A) the franchisee shows--

(i) the franchise of which he is a party has been terminated or the franchise relationship of which he is a party has not been renewed, and

(ii) there exist sufficiently serious questions going to the merits to

make such questions a fair ground for litigation; and

(B) the court determines that, on balance, the hardships imposed upon the franchisor by the issuance of such preliminary injunctive relief will be less than the hardship which would be imposed upon such franchisee if such preliminary injunctive relief were not granted.

(3) Nothing in this subsection prevents any court from requiring the franchisee in any action under subsection (a) to post a bond, in an amount established by the court, prior to the issuance or continuation of any equitable relief.

(4) In any action under subsection (a), the court need not exercise its equity powers to compel continuation or renewal of the franchise relationship if such action was commenced--

(A) more than 90 days after the date on which notification pursuant to section 104(a) [15 U.S.C. § 2804(a)] was posted or personally delivered to the franchisee;

(B) more than 180 days after the date on which notification pursuant to section 104(b)(2) [15 U.S.C. § 2804(b)(2)] was posted or personally delivered to the franchisee; or

(C) more than 30 days after the date on which the termination of such franchise or the nonrenewal of such franchise relationship takes effect if less than 90 days notification was provided pursuant to section 104(b)(1) [15 U.S.C. § 2804(b)(1)].

(c) Burden of proof; burden of going forward with evidence. In any action under subsection (a), the franchisee shall have the burden of proving the termination of the franchise or the nonrenewal of the franchise relationship. The franchisor shall bear the burden of going forward with evidence to establish as an affirmative defense that such termination or nonrenewal was permitted under section 102(b) or 103 [15 U.S.C. §§ 2802(b) or 2803], and, if applicable, that such

franchisor complied with the requirements of section 102(d) [15 U.S.C. § 2802(d)].

(d) Actual and exemplary damages and attorney and expert witness fees to franchisee; determination by court of right to exemplary damages and amount; attorney and expert witness fees to franchisor for frivolous actions.

(1) If the franchisee prevails in any action under subsection (a), such franchisee shall be entitled--

(A) consistent with the Federal Rules of Civil Procedure to actual damages;

(B) in the case of any such action which is based upon conduct of the franchisor which was in willful disregard of the requirements of section 102 or 103 [15 U.S.C. §§ 2802 or 2803], or the rights of the franchisee thereunder, to exemplary damages, where appropriate; and

(C) to reasonable attorney and expert witness fees to be paid by the franchisor, unless the court determines that only nominal damages are to be awarded to such franchisee, in which case the court, in its discretion, need not direct that such fees be paid by the franchisor.

(2) The question of whether to award exemplary damages and the amount of any such award shall be determined by the court and not by a jury.

(3) In any action under subsection (a), the court may, in its discretion, direct that reasonable attorney and expert witness fees be paid by the franchisee if the court finds that such action is frivolous.

(e) Discretionary power of court to compel continuation or renewal of franchise relationship; grounds for noncompulsion; right of franchisee to actual damages and attorney and expert witness fees unaffected.

(1) In any action under subsection (a) with respect to a failure of a franchisor to renew a franchise relationship in compliance with the requirements of section 102 [15 U.S.C. § 2802], the court may not compel a continuation or renewal of the franchise relationship if the franchisor demonstrates to the satisfaction of the court that--

(A) the basis for such nonrenewal is a determination made by the franchisor in good faith and in the normal course of business--

(i) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,

(ii) to materially alter, add to, or replace such premises,

(iii) to sell such premises,

(iv) to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, or

(v) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee; and

(B) the requirements of section 104 [15 U.S.C. § 2804] have been complied with.

(2) The provisions of paragraph (1) shall not affect any right of any franchisee to recover actual damages and reasonable attorney and expert witness fees under subsection (d) if such nonrenewal is prohibited by section 102 [15 U.S.C. § 2802].

(f)(1) No franchisor shall require, as a condition of entering into or renewing the franchise relationship, a franchisee to release or waive--

(A) any right that the franchisee has under this title or other Federal law; or

(B) any right that the franchisee may have under any valid and applicable State law.

(2) No provision of any franchise shall be valid or enforceable if the provision specifies that the interpretation or enforcement of the franchise shall be governed by the law of any State other than the State in which the franchisee has the principal place of business of the franchisee.

§ 2806. Relationship of statutory provisions to State and local laws

(a)(1) To the extent that any provision of this title applies to the termination (or the furnishing of notification with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notification with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce, or continue in effect any provision of any law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notification with respect thereto) of any such franchise or to the nonrenewal (or the furnishing of notification with respect thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this title.

(2) No State or political subdivision of a State may adopt, enforce, or continue in effect any provision of law (including a regulation) that requires a payment for the goodwill of a franchisee on the termination of a franchise or nonrenewal of a franchise relationship authorized by this title.

(b)(1) Nothing in this title authorizes any transfer or assignment of any franchise or prohibits any transfer or assignment of any franchise as authorized by the provisions of such franchise or by any applicable provision of State law which permits such transfer or assignment without regard to any provision of the franchise.

(2) Nothing in this title shall prohibit any State from specifying the terms and conditions under which any franchise or franchise relationship may be transferred to the designated successor of a franchisee upon the death of the franchisee.

Oregon Motor Fuel Franchises Act

650.200. Definitions for ORS 650.200 to 650.250.

As used in ORS 650.200 to 650.250, unless the context requires otherwise:

(1) "Affiliate" means any person who, other than by means of a franchise, controls, is controlled by or is under common control with any other person.

(2) "Company operated station" means a motor fuel service station operated by a franchisor with employees of the franchisor or by a commission manager of the franchisor for the sale of motor fuel to the general public for ultimate consumption.

(3) "Contract" means any oral or written agreement. For supply purposes, delivery levels during the same month of the previous year shall be prima facie evidence of an agreement to deliver such levels.

(4) "Control" means the direct or indirect ownership of or the right to exercise a directing influence over more than 50 percent of the beneficial interest in any person.

(5)(a) "Franchise" means any contract:

(A) Between a refiner and a motor fuel distributor;

(B) Between a refiner and a motor fuel retailer;

(C) Between a motor fuel distributor and another motor fuel distributor; or

(D) Between a motor fuel distributor and a motor fuel retailer,

under which a refiner or motor fuel distributor authorizes or permits a motor fuel retailer or motor fuel distributor to use, in connection with the sale, consignment or distribution of motor fuel, a trademark which is owned or controlled by such refiner or motor fuel distributor or by a refiner which supplies motor fuel to the motor fuel distributor which authorizes or permits such use.

(b) "Franchise" includes:

(A) Any contract under which a motor fuel retailer or motor fuel distributor is authorized or permitted to occupy leased marketing premises, to be employed in connection with the sale, consignment or distribution of motor fuel under a trademark which is owned or controlled by such refiner or motor fuel distributor or by a refiner which supplies motor fuel to the motor fuel distributor which authorizes or permits such occupancy;

(B) Any contract pertaining to the supply of motor fuel which is to be sold, consigned or distributed under a trademark owned or controlled by a refiner or motor fuel distributor or under a contract which has existed continuously since May 15, 1973, and pursuant to which, on May 15, 1973, motor fuel was sold, consigned or distributed under a trademark owned and controlled on such date by a refiner or motor fuel distributor; and

(C) The unexpired portion of any franchise, as defined in this paragraph, which is transferred or assigned as authorized by the provisions of such franchise or by any applicable provisions of law which permits such transfer or assignment without regard to any provision of the franchise.

(6) "Franchise relationship" means the respective motor fuel marketing or distribution obligations and responsibilities of a franchisor and a franchisee which result from the marketing of motor

fuel under a franchise.

(7) "Franchisee" means a motor fuel retailer or motor fuel distributor who is authorized or permitted under a franchise to use a trademark in connection with the sale, consignment or distribution of motor fuel.

(8) "Franchisor" means a refiner or motor fuel distributor who, under a franchise, authorizes or permits a retailer or motor fuel distributor to use a trademark in connection with the sale, consignment or distribution of motor fuel.

(9) "Leased marketing premises" means marketing premises owned, leased or in any way controlled by a franchisor and which the franchisee is authorized or permitted, under the franchise, to employ in connection with the sale, consignment or distribution of motor fuel.

(10) "Marketing premises" means in the case of any franchise, premises which, under such franchise, are to be employed by the franchisee in connection with the sale, consignment or distribution of motor fuel.

(11) "Motor fuel" means gasoline and diesel fuel of a type distributed for use as a fuel in self-propelled vehicles designed primarily for use on public streets, roads and highways.

(12) "Motor fuel distributor" means any person, including any affiliate of such person, who:

(a) Purchases motor fuel for sale, consignment or distribution to another; or

(b) Receives motor fuel on consignment for distribution to the distributor's own motor fuel accounts or to accounts of the distributor's supplier, but shall not include a person who is an employee of, or merely serves as a common carrier providing transportation service for, such supplier or who receives motor fuel

on consignment for sale to the general public for ultimate consumption.

(13) "Motor fuel retailer" means any person who purchases motor fuel for sale to the general public for ultimate consumption.

(14) "Refiner" means any person engaged in the refining of crude oil to produce motor fuel, and includes any affiliate of such person.

650.205. Prohibited conduct by franchisor.

Notwithstanding the terms of any franchise, a franchisor shall not:

(1) Require any franchisee to meet unreasonable mandatory minimum sales volume requirements for fuel or other products;

(2) Alter the franchise premises during the effective term of the franchise without the consent of the franchisee. This subsection does not apply to alterations required by law;

(3) Interfere with any franchisee's right to assistance of counsel on any matter or to join or be active in any trade association;

(4) Set or compel, directly or indirectly, the retail price at which the franchisee sells motor fuel or other products; and

(5)(a) With respect to credit cards issued by the franchisor, chargeback any credit card invoice to a motor fuel franchisee unless the franchisor provides the cardholder's last-known address, the reason for chargeback, a refund or credit for any credit card handling fee collected on the transaction by the franchisor from the franchisee, and the original invoice of the credit card charge or the legal equivalent if the franchisor has previously received the invoice or a copy thereof. The cardholder's address need not be provided if the chargeback is based on any alleged unlawful, fraudulent or deceptive act of the franchisee or an employee of the franchisee, or if the

cardholder claims no legal responsibility for payment of the charge because it involved the unauthorized use of a credit card.

(b) The terms and conditions governing a motor fuel franchisee's acceptance of a franchisor issued credit card, including the reasons for which a chargeback may be made, shall be established in writing and a copy thereof provided to the franchisee. The franchisor or its agent shall provide at least 30 days' prior written notice to a franchisee before implementing any change to previously disclosed terms and conditions if such change may increase the franchisee's cost of accepting the franchisor issued credit card or if such change adds to or amends the reasons for which a chargeback may occur.

(c) No credit card invoice for a franchisor issued credit card shall be charged back after 90-days from the date a charge invoice was submitted to the franchisor, except that a chargeback may be made beyond the 90-day period if the cardholder or franchisor alleges fraudulent or other unlawful actions by the franchisee or an employee thereof in making the sale, or if the cardholder refuses payment to the franchisor pursuant to rights granted under § 170 of the Federal Truth-in-Lerding Act (15 U.S.C. 1666i), or any rule issued under § 5 of the Federal Trade Commission Act (15 U.S.C. 46), unless the cardholder's refusal to pay is the fault of the franchisor.

650.210. Rights and prohibitions governing relationship between franchisor and franchisee.

Without liniting the other provisions of ORS 650.200 to 650.250, the following specific rights and prohibitions shall govern the relationship between the franchisor and the franchisee. It shall be unlawful and a violation of ORS 650.200 to 650.250 for any franchisor to:

(1) Require a franchisee to purchase or lease goods or services of a

franchisor or from approved sources of supply unless and to the extent that the franchisor satisfies the burden of proving that such restrictive purchasing agreements are reasonably necessary for a lawful purpose justified on business grounds, and do not substantially affect competition. This subsection does not apply to the initial inventory of the franchise. A determination of whether such restrictive purchasing agreements are reasonably necessary for a lawful purpose justified on business grounds and do not substantially affect competition shall be guided by the decisions of the courts of the United States in interpreting and applying the antitrust laws of the United States.

(2) Sell, rent or offer to sell or rent to a franchisee any product, service or property at a price not set in good faith as defined in ORS 72.1030 (1)(b).

(3) Require a franchisee to assent to a release, assignment, novation or waiver which would relieve any person from liability imposed by ORS 650.200 to 650.250.

(4) Refuse to renew a franchise without fairly compensating the franchisee for the fair market value at the time of expiration of the franchise of the franchisee's resalable inventory, supplies, equipment and furnishings purchased from the franchisor, not including personalized materials that have no value to the franchisor and inventory, supplies, equipment and furnishings not reasonably required in the conduct of the franchise business. A franchisor may offset against amounts owed to a franchisee under this subsection any amounts owed by such franchisee to the franchisor.

(5) Impose on a franchisee by contract, rule or regulation, whether written or oral, any standard of conduct unless the person so doing can sustain the burden of proving the standard of conduct to be reasonable.

650.215. Prohibited conduct in offer, sale or purchase of franchise.

It is unlawful for any person in connection with the offer, sale or purchase of any franchise directly or indirectly:

(1) To sell or offer to sell a franchise in this state by means of any written or oral communication which includes an untrue statement of a material fact.

(2) To employ any device, scheme or artifice to defraud.

(3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.

650.220. Consent of franchisor to sale, assignment or transfer of franchise; conditions for trial franchise.

(1) Notwithstanding the terms of any franchise, a franchisor shall not prohibit or unreasonably withhold its consent to any sale, assignment or other transfer of the franchise by a franchisee to a qualified third party.

(2) If the franchisor consents to the proposed sale, assignment or other transfer and the proposed third party has not previously been a party to a franchise with the franchisor, the franchisor at its option may require the third party to accept in lieu of the assigned franchise a trial franchise as defined in The Petroleum Marketing Practices Act, (15 U.S.C. 2803), on the terms and conditions then generally being extended by the franchisor to similarly situated franchisees. Entry into the trial franchise shall terminate the franchise proposed to be sold, assigned or transferred.

650.225. Death of franchisee; when franchisor required to enter into new franchise with designee of franchisee; notice; qualifications;

possession of franchise premises.

(1) Following the death of a motor fuel retailer franchisee and notwithstanding the terms of the franchise, the franchisor, in the case of leased marketing premises, shall enter into a new franchise with the designee of the motor fuel retailer franchisee on the terms and conditions then generally being extended by the franchisor to similarly situated motor fuel retailers if:

(a) Prior to the death of a motor fuel retailer franchisee, the motor fuel retailer franchisee notifies the franchisor in writing of the designee, who shall be the surviving spouse, adult child, or adult stepchild of the motor fuel retailer franchisee or in the absence of a designation, the motor fuel retailer franchisee's surviving spouse, if any;

(b) At the time of the motor fuel retailer franchisee's death, the designee meets the qualifications then being required by the franchisor for its motor fuel retailer franchisees; and

(c) Within 10 days following the motor fuel retailer franchisee's death, the designee enters into a new franchise with the franchisor on the terms and conditions then generally being extended by the franchisor to similarly situated motor fuel retailer franchisees, except that for the part of the term of the new lease equal to the unexpired portion of decedent franchisee's prior lease, the rent shall be the same as under the prior lease.

(2) Until the designee enters into a new franchise as provided in subsection (1) of this section, the franchisor shall be entitled to possess and to operate the marketing premises for the franchisor's own account.

650.230. Transfer of franchise to corporation in which franchisee has

controlling interest; conditions.

Notwithstanding the terms of any franchise, no franchisor may prohibit or prevent the sale, assignment or other transfer of a franchise to a corporation in which the franchisee has and maintains a controlling interest if the franchisee offers in writing personally to guarantee the performance of the obligations under the franchise. In the event of a sale, assignment or transfer under this section, the franchisor may require the corporation to assume in writing all of the franchisee's obligations to the franchisor under the franchise and may require the franchisee to maintain a controlling interest in the corporation and actively operate the marketing premises during the time that the franchise with the corporation continues.

650.235. Franchisor prohibited from requiring operation of service station in excess of 16 hours per day; exceptions.

(1) A franchisor, as a condition for renewal of a franchisee lease or a supply agreement, shall not require a franchisee to operate a service station for the sale of motor fuel to the public for ultimate consumption in excess of 16 hours per day.

(2) This section shall not apply:

(a) If specific hours of business or operation are required under the franchisor's prime lease or license from any governmental entity, airport, parking, marine or port authority, shopping center or any private investor not affiliated with or controlled by the franchisor;

(b) If the service station is located within one-fourth mile of access to any limited access highway of the federal highway system;

(c) To hours of operation exceeding 16 hours per day that have been agreed upon by the franchisor and the franchisee; or

(d) If the franchisor uniformly requires a 24-hour operation by all of its franchisees.

650.240. When transfer of motor fuel a sale in commerce.

For purposes of ORS 646.040, the transfer of motor fuel from a franchisor to a company operated station or a franchisee shall be a sale in commerce.

650.245. Principle of good faith.

Without limiting the other provisions of ORS 650.200 to 650.250, the principle of good faith shall govern the relationship and dealings of the parties with each other.

650.250. Injunctive relief or damages; attorney fees and costs; limitation on commencement of action.

Any person who is injured in the person's business or property by reason of a violation of ORS 650.250 to 650.250 may sue therefor in any court having jurisdiction in the county where the defendant resides or is found, or any agent resides or is found, or where service may be obtained, for injunctive relief or to recover the damages sustained by the person, and may be awarded attorney fees together with the costs of the suit. Any action brought pursuant to this section shall be commenced within four years after the cause of action accrued.

1987 and 1990 Red-Lined Resolution of Dispute Clauses

~~1987~~1990 AGREEMENT

~~23~~22. **Resolution of Disputes**

a) Except as set forth below or where prohibited by applicable law, any dispute or controversy relating to or arising out of ~~this~~the Agreement including, without limitation, the negotiation, breach, validity or enforceability of ~~this~~the Agreement or any part thereof, the obligations created by ~~this~~the Agreement or the relationship between the parties, which dispute or controversy the parties cannot mutually resolve (including tort and contract claims, claims based upon ~~any~~ federal, state or local statute, law, order, ordinance or ~~regulation~~regulations, and claims arising out of any relationship before, at the time of entering, during the ~~term~~terms of, or upon or arising out of any relationship before, at the time of entering, during the terms of, or upon or after expiration or termination of ~~this~~the Agreement), shall be resolved by binding arbitration in accordance with the procedures and rules set forth in Exhibit E attached hereto and incorporated herein. The site of such arbitration shall be as set forth in Exhibit E. The decision of the arbitrator(s) shall be final and binding on the parties and access to a judicial forum is foreclosed, except ~~as follows: to enforce an arbitral decision; as required by law; or; to resolve a PMPA claim as set forth below~~ as required by law. Judgment upon the award of the arbitrator(s) may be entered and enforced in any court having jurisdiction thereof. Each party shall pay its own costs and expenses, including attorneys' fees related to such arbitration, except that the cost and expenses of the ~~American Arbitration Association~~arbitration association or service utilized, stenographic record, and witnesses and proofs that may have been produced at the direction of the arbitrator(s) shall be paid by the party against whom the decision of the arbitrator(s) is entered and the cost of the arbitrator(s) shall be paid as set forth in the succeeding

sentence. If an arbitral ~~or appellate~~ panel consists of a single arbitrator, the cost and expenses of the arbitrator shall be paid by the party against whom the decision of the arbitrator is entered; however, if an arbitral ~~or appellate~~ panel consists of three arbitrators, the ~~cost~~costs and expenses of the two additional arbitrators shall be paid by the party which initially requested three arbitrators; the cost and expenses of any single arbitrator appointed by the ~~American Arbitration Association~~arbitration association or service utilized, as set forth in Section F of Exhibit E, before the arbitral panel is selected shall be paid one-half by the plaintiff(s) and one-half by the defendant(s).~~–~~

~~If a party unsuccessfully appeals a panel's award to an appellate~~b) The arbitrator(s)~~, that party shall pay the opposing party's attorneys' fees in contesting the appeal~~ may not assess punitive or exemplary damages but may award both legal and equitable relief.

~~If the dispute or controversy involves a PMPA claim, rather than resolving such claim through arbitration as set forth above, Buyer or ARCO may separate that claim from others involved in that dispute, if any, and litigate such claim in a court of appropriate jurisdiction in accordance with the provisions of Section 2805 of PMPA. Nothing in this paragraph shall be interpreted to in any way waive, alter or impede ARCO's right of removal of a PMPA claim from a state court to a federal court. All expenses of the parties related to such court action, including attorney's fees, shall be paid by the party against whom the decision of the court is entered.~~

~~The arbitrator(s) may not assess punitive or exemplary damages but may award both legal and equitable relief.~~ If the dispute or controversy involves a claim for equitable relief as well as a claim for damages or other legal relief and the arbitrator(s) enter(s) a decision as to the equitable claims before entering a decision as to the legal claims, judgment upon the decision as to the equitable relief may be

immediately entered and enforced in any court having jurisdiction thereof.

c) This ~~paragraph of this Agreement~~Paragraph 22 shall survive termination or expiration of ~~this~~the Agreement as to any claims covered by ~~this~~the Agreement.

Exhibit E, Procedures for Arbitration

A. INITIATION

To initiate an arbitration, ARCO or Buyer must file with the arbitration association or service set forth in Section J below (the Association/Service) and send the opposing party at the address specified in the Notices provision of the Agreement by registered or certified mail, return receipt requested, a written arbitration demand. The demand shall set forth a clear and complete statement of the nature of the claim, its basis, the remedy sought, including the amount of damages if any, and whether the party desires a panel consisting of one or three arbitrator(s). The party waives the right to seek any relief or pursue any claim not included in an arbitration demand filed and served within 90 days following the date the party knew or should have known of the facts giving rise to the claim and in no event more than six months after the occurrence of the facts giving rise to the claim in the absence of active fraud or concealment of the facts by the opposing party.

The opposing party may, within thirty days of receiving the arbitration demand, assert a counterclaim, set-off and/or request a panel of three arbitrators. The counterclaim or set-off, which shall be filed with the Association/Service and sent to the initiating party at the address specified in the Notices provision of the Agreement by registered or certified mail, return receipt requested, shall be a clear and complete statement of the nature of the counterclaim or set-off,

its basis, and the remedy sought, including the amount of damages if any. If the initiating party requested a panel of one arbitrator and the opposing party desires a panel of three arbitrator, the opposing party must request three arbitrators within the thirty day period.

Each arbitration shall be limited to dispute(s) arising out of a single franchise agreement or the relationships related thereto or deriving therefrom. There shall be no joinder or consolidation of claims arising out of different agreements.

B. SELECTION OF ARBITRATION PANEL

The dispute shall be decided initially by a panel of one or, if requested by either party, three arbitrators selected as follows. The Association/Service shall submit to the parties, within ten days after receipt of an arbitration demand, a list of five (or in the case of three arbitrators, seven) potential arbitrators consisting of retired federal or state court judges who were with the highest trial court of general jurisdiction in their jurisdiction; providing that none of these judges is engaged in a business of producing, refining, or marketing petroleum or petroleum products. Each party shall, within five days, strike two, one or none of the arbitrators, rank the remaining arbitrators in order of preference (with "1" designating the most preferred, "2" the next most preferred and so forth) and so advise the Association/Service in writing. The Association/Service shall appoint the arbitrator(s) with the best combined preference ranking on both lists. If the panel consists of three arbitrators, the Association/Service shall designate one arbitrator as presiding officer.

C. PREHEARING DISCOVERY

There shall be no prehearing discovery except as follows. Each party may propound to the other no more than thirty interrogatories, including subparts, and may request the opportunity to inspect and/or copy documents to the extent and in the manner provided by the

Federal Rules of Civil Procedure, with such modifications or additions as the panel may prescribe, and each party may take no more than five (5) depositions of the other party. Disputes concerning discovery obligations or protection of discovery materials shall be determined before hearing by the single arbitrator or, where applicable, the presiding officer of the arbitration panel.

D. ARBITRATION HEARING

The arbitrator or, where applicable, the presiding officer of the arbitration panel shall designate the place and time of the hearing. The hearing shall be scheduled to begin within 120 days after the filing of the arbitration demand unless extended by the arbitration panel on a showing of exceptional circumstances. The parties shall have the right to attend the hearing, to be represented by counsel, to present documentary evidence and witnesses, to cross-examine opposing witnesses and to subpoena witnesses. Federal Rules of Evidence shall apply and the panel shall determine the competency, relevance, and materiality of evidence as appropriate. The panel shall recognize privileges available under applicable law. A stenographic record shall be made of the arbitration proceedings and the confidentiality of such record and its contents shall be maintained by the parties and the arbitrators and such record shall not be revealed in whole or in part to any person or entity not a party to the arbitration, an arbitrator of the arbitration, the Association/Service or a court in which the award is entered. Such obligation of confidentiality shall survive the arbitrations and the termination or expiration of any agreement or relationship between the parties. Inasmuch as the parties recognize that damages for a violation of the obligation of confidentiality would be difficult to measure and that the most reasonable estimate of actual damages for such violation would be $5000 per violation, any party violating such obligation of confidentiality shall pay the other party $5000 per violation. In addition, the non-violating party may enjoin such violations and the

violating party shall pay the non-violating party's attorneys' fees and cost incurred in the injunction action.

E. AWARD

The panel's award shall be made by the arbitrator or, where applicable, by majority vote of the panel. An award in writing signed by the arbitrator or, where applicable, by at least two of the panel's arbitrator shall set forth the panel's findings of fact and conclusions of law. The award shall be filed with the Association/Service and mailed to the parties no later than thirty days after the matter is submitted for decision after hearing. The panel shall have authority to issue any lawful relief that is just and equitable, except punitive damages. The award shall state that it dissolves and supersedes any provisional remedies entered pursuant to Section F below.

F. PROVISIONAL REMEDIES

Pending the selection of the arbitration panel, upon request of a party, the Association/Service may appoint an arbitrator to order preliminary relief. This award may be immediately entered in any federal or state court having jurisdiction thereof even though the decision on the underlying dispute may still be pending. Once constituted, the arbitration panel may, upon request of a party, issue a superseding order to modify or reverse such preliminary relief or may itself order preliminary relief pending a full hearing on the merits of the underlying dispute. Any such initial or superseding order of preliminary relief may be immediately entered in any federal or state court having jurisdiction thereof even though the decision on the underlying dispute may still be pending. Such relief may be granted by the appointed arbitrator or the arbitration panel only after notice to and opportunity to be heard by the opposing party. Such awards of preliminary relief shall be in writing and, if ordered by a panel of three arbitrators, must be signed by at least two of the panel members.

G. GOVERNING LAW

Federal law, including the provisions of Title 9 of the United States Code, shall govern all issues concerning the validity, enforceability and interpretation of this arbitration agreement. The substantive law governing the underlying dispute shall be that of the state in which the Buyer's principal place of business is located, unless the arbitration concerns PMPA or other federal issues as to which Federal law is applicable.

H. ENTRY OF AWARD BY COURT

The arbitral panel's arbitration award shall be final twenty days after it is rendered. The parties consent that judgment upon the final arbitration award may be entered in any federal or state court having jurisdiction thereof but shall have no precedential effect on any other arbitration.

I. COSTS AND ATTORNEY'S FEES

The party losing the arbitration shall pay all expenses and fees of the Association/Service, all costs of the stenographic record, all expenses of witnesses or proofs that may have been produced at the direction of the arbitrator(s) and the cost of the arbitrator(s) shall be paid as set forth in the succeeding sentence. If an arbitral panel consists of a single arbitrator, the cost and expenses of the arbitrator shall be paid by the losing party; however, if an arbitral panel consists of three arbitrators, the cost and expenses of the presiding officer shall be paid by the losing party and the cost and expenses of the two additional arbitrators shall be paid by the party which initially requested three arbitrators; and, if the Association/Service appointed a single arbitrator before the arbitral panel was selected, as set forth in Section F above, the cost of such arbitrator shall be paid one-half by the plaintiff(s) and one-half by the defendant(s). The arbitral panel shall designate the losing party for these purposes.

J. ARBITRATION ASSOCIATIONS OR SERVICES

To initiate and maintain arbitration proceeding, ARCO and/or Buyer shall utilize the following arbitration associations or services in the states indicated:

California, Oregon and Washington:
Judicial Arbitration & Mediation Services Inc.
Los Angeles, California
Orange, California
Santa Monica, California
San Bernardino, California
San Diego, California
Fresno, California
Sacramento, California
San Jose, California
San Francisco, California
Portland, Oregon
Seattle, Washington

Nevada:
United States Arbitration and Mediation of Arizona, Inc.
(New Mexico and Nevada)
Las Vegas, Nevada
Reno, Nevada

American Arbitration Association
Las Vegas, Nevada
Reno, Nevada

Arizona:
United States Arbitration and Mediation of Arizona, Inc.
Phoenix, Arizona

In the event, and only in the event, that the Judicial Arbitration and Mediation Services Inc. fails or is unable to provide necessary and

required services in California, Oregon, and Washington, or the United States Arbitration and Mediation of Arizona, Inc. fails or is unable to provide necessary and required services in Arizona, then, and only then, shall ARCO and/or Buyer utilize the arbitration services of the American Arbitration Association.

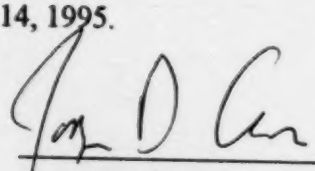
PROOF OF SERVICE

Pursuant to S.Ct. Rule 29.5, I certify that on June 13, 1995, I served 2 copies of the attached PETITION FOR WRIT OF CERTIORARI by first-class mail pursuant to S.Ct. Rule 29.3 to:

Mildred J. Carmack
SCHWABE, WILLLIAMSON & WYATT
1600-1800 Pacwest Center
1211 SW Fifth Avenue
Portland, OR 97204
(503) 222-9981
Counsel for Respondent Graham Oil

Pursuant to 28 U.S.C. § 1746, I declare that the foregoing is true and correct.

Executed on: June 14, 1995.



Joseph D. Cohen
Counsel for Petitioner

(2)

No. 94-2060

Supreme Court, U.S.
FILED
JUL 17 1995
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARCO PRODUCTS CO.,

Petitioner,

v.

GRAHAM OIL CO.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Mildred J. Carmack
Neva T. Campbell, *Counsel of Record*
Schwabe, Williamson & Wyatt
Pacwest Center, Suites 1600-1800
1211 S.W. Fifth Avenue
Portland, OR 97204
Telephone: (503) 222-9981
Attorneys for Respondent

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QUESTIONS PRESENTED FOR REVIEW

1. May petroleum product franchisors require that franchisees, as a condition of being permitted to renew their franchise agreements, give up substantive rights expressly granted to them by the Petroleum Marketing Practices Act?

2. Was it error to hold invalid an arbitration clause in a petroleum franchise agreement when that clause (1) established a unified procedure for handling all disputes, (2) contained three different provisions that were illegally imposed by the franchisor in contravention of the Petroleum Marketing Practices Act, and (3) contained a provision indicating an intent that the arbitration clause be treated as an integrated whole?

SUPPLEMENTAL STATEMENT AS TO PARTIES

The named parties to the proceeding in the court below are Graham Oil Company and ARCO Products Company. Respondent Graham Oil Company has no parent or subsidiary companies that require listing pursuant to Rule 29.1.

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No. 94-2060

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARCO PRODUCTS CO.,

Petitioner,

v.

GRAHAM OIL CO.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Graham Oil Co. respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner ARCO Products Co.

SUPPLEMENTAL STATEMENT OF THE CASE

When Petitioner ARCO presented Graham, its franchisee, with a proposed agreement to renew Graham's ARCO franchise (Petition for Certiorari at 3), ARCO specifically refused to bargain over its terms, including provisions that for the first time in the history of the parties' relationship attempted to eliminate rights that are granted to franchisees by the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806. ARCO's transmittal letter said:

> THE PROVISIONS OF THE ATTACHED AGREEMENT ARE MUTUALLY DEPENDENT, AND THEREFORE THE ATTACHED AGREEMENT MUST BE ACCEPTED OR REJECTED AS A WHOLE. ANY FAILURE TO AGREE TO THE ATTACHED AGREEMENT WILL BE DEEMED A GROUND FOR NONRENEWAL OF ANY "FRANCHISE RELATIONSHIP" UNDER THE PETROLEUM MARKETING PRACTICES ACT.

Plaintiff's Ex. 6, p. 10. The United States Court of Appeals for the Ninth Circuit explained that its decision comports with Congressional policy:

> [T]he fact that franchisees may agree to an arbitral forum for the resolution of statutory disputes in no way suggests that they may be forced by those with dominant economic power to surrender the statutorily-mandated rights and benefits that Congress intended them to possess. . . . If franchisees could be compelled to

> surrender their statutorily-mandated protections as a condition of obtaining franchise agreements, then franchisors could use their superior bargaining power to deprive franchisees of the PMPA's protections. In effect, the franchisors could simply continue their earlier practice of presenting prospective franchisees with contracts of adhesion that deny them the rights and benefits afforded by Congress. In that way, the PMPA would quickly be nullified.

Petition for Certiorari, Appendix, at A-5.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Ninth Circuit held that the arbitration clause that ARCO required Graham to accept as a condition of renewing its franchise contained three different provisions purporting to deprive Graham of three different rights expressly granted franchisees by the Petroleum Marketing Practices Act. Those rights are substantive, and are important to carrying out the purposes of the Act. The Court of Appeals correctly concluded that ARCO's imposition of those terms in the arbitration clause was illegal.

Having so concluded, the Court of Appeals determined that the entire arbitration clause should be held invalid. That determination was based on the specific features of ARCO's arbitration clause and on its expressed relationship to the

remainder of the agreement, as well as on the fact that it contained multiple illegal provisions. That determination was specific to the arbitration clause involved in this case.

The general principle of contract law upon which the Court of Appeals relied was that severance of individual contract provisions for invalidation is inappropriate when the entire clause represents an "integrated scheme to contravene public policy." ARCO has not contended that principle is an incorrect statement of the law. It argues only that *in this case* the court should have invalidated the specific illegal terms and left the remainder of the arbitration provisions in place.

That is a determination that should be made on a case-by-case basis depending on the details of the particular arbitration clause and its relationship to the remainder of the contract. On the facts presented here, the decision of the United States Court of Appeals for the Ninth Circuit was correct. The case presents no issues that require review by this Court.

REASONS FOR DENYING THE WRIT

As shown below, the ruling of the United States Court of Appeals for the Ninth Circuit depends heavily on the terms of a single petroleum franchise agreement. Neither the record nor the reported decisions indicate that other petroleum franchise contracts contain such provisions. There is no conflict

among the circuits, nor does the case present any issue of constitutional dimension or any general issues of federal law that have broad application. It is a fact-specific dispute, properly resolved below, about a contract of adhesion that ran afoul of express provisions of the Petroleum Marketing Practices Act. This Court's intervention is not required.

I.

The Case Does Not Present the Questions that Petitioner Has Proposed for Review

A. This Case Is Not About Procedural Waivers Mutually Agreed to by the Parties.

Petitioner ARCO attempts, by the phrasing in its first proposed question for review, to create the impression that the parties mutually agreed to waive certain statutory procedures, and that the Court of Appeals for the Ninth Circuit has held they could not do so. That is not what happened.

First, there was nothing mutual about the so-called waiver. It was unilaterally dictated by ARCO. Petition for Certiorari, Appendix, at A-5, A-7. And see above at p. 2 and below at note 7.

Second, the arbitration clause imposed by ARCO did not simply provide substitutes for "procedural" matters under the PMPA. It required Graham to forego *substantive* rights that are specifically granted by the PMPA: the right to a one-year

period in which to assert claims against the franchisor, the right to exemplary damages under defined circumstances, and the right to recover reasonable attorney fees upon successful prosecution of certain claims.

Congress expressly granted franchisees such rights because it was aware that petroleum product franchisors typically use their disproportionate bargaining power to do what ARCO did here: impose, unilaterally, one-sided contractual terms that are unfavorable to franchisees.[1]

B. This Case Is Not About Merely Incidental Provisions in the Arbitration Clause.

ARCO's second proposed question contains the unsupported assumption that the portions of the arbitration clause that the Court of Appeals held it imposed illegally were

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[1] Central to the problems faced by franchisees in this regard is the disparity of bargaining power which exists between the franchisor and the franchisee. . . .

It is important to note that while the relationship of the parties to a motor fuel franchise agreement is basically contractual in nature, normal remedies for violations of the contractual provisions are often eschewed by the franchisor. . . .

S. Rep. No. 731, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.Code Cong. & Ad. News 873, 876.

somehow merely collateral to the real arbitration provisions. Again, that is not the case.

The elimination of the one-year statutory limitation period is at the heart of the initial paragraph of ARCO's arbitration procedures; it attempts to limit the right of franchisees to assert Congressionally-authorized claims against franchisors.[2] The denial of the right to exemplary damages is an express exception to the arbitrators' authority to grant just and equitable relief on those claims.[3] The denial of the right

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[2]See Petition for Certiorari, Appendix, at A-66:

> . . . The party [demanding arbitration] waives the right to seek any relief or pursue any claim not included in an arbitration demand filed and served within 90 days following the date the party knew or should have known of the facts giving rise to the claim and in no event more than six months after the occurrence of the facts giving rise to the claim in the absence of active fraud or concealment of the facts by the opposing party.

[3]See Petition for Certiorari, Appendix, at A-69:

> . . . The panel shall have authority to issue any lawful relief that is just and equitable, except punitive damages.

to recover attorney fees is an integral part of the franchise agreement's dispute resolution clause.[4]

The Court of Appeals for the Ninth Circuit explained that all of these rights are

> . . . important to the effectuation of the PMPA's policies. The purpose of exemplary damages is to deter franchisors from engaging in improper terminations of franchise agreements. The purpose of attorney's fees is to deter franchisors from improperly contesting meritorious claims. Finally, the purpose of a one-year statute of limitations is to afford franchisees a reasonable period of time in which to seek relief for improper terminations and other abuses by petroleum franchisors. . . .

Petition for Certiorari, Appendix, at A-7.

ARCO has not challenged this summary of the importance of the statutory rights involved here. The provisions of the arbitration clause that would have eliminated those rights are not merely incidental.

In deciding to hold the entire arbitration clause invalid, the Court of Appeals stated:

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[4]See Petition for Certiorari, Appendix, at A-64:

> . . . Judgment upon the award of the arbitrator(s) may be entered and enforced in any court having jurisdiction thereof. Each party shall pay its own costs and expenses, including attorneys' fees related to such arbitration . . .

> . . . As a leading treatise notes, severance is inappropriate when the entire clause represents an "integrated scheme to contravene public policy." *See* E. Allan Farnsworth, *Farnsworth on Contracts* § 5.8, at 70 (1990). . . .

Petition for Certiorari, Appendix, at A-9. ARCO does not contend this is an incorrect rule of law; it argues only that the facts of this case call for the application of a different rule (Petition for Certiorari at 13). That is a case-specific issue, not the kind of question that requires review by this Court.

C. This Case Does Not Involve Fact-Finding at the Appellate Level.

ARCO's final proposed question for review asks whether a federal appellate court may "engage in fact-finding in the first instance." There has been no appellate level fact-finding in this case, however. The Court of Appeals for the Ninth Circuit did nothing more than use the phrase "the fact that" -- a common rhetorical device[5] -- in the course of pointing out what is readily apparent from ARCO's imposition of the arbitration clause as a required part of its franchise agreement: that

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[5]A computer search of this court's decisions produced a list of more than 5,000 cases in which that phrase, or a very similar one, occurs -- often more than once in a single opinion.

ARCO was attempting to nullify express requirements of the PMPA.[6]

II.

The Decision of the Ninth Circuit Leaves Parties Free To Agree To Arbitrate PMPA Claims on Mutually Agreeable Terms

The court below held a specific arbitration clause in a specific contract to be invalid for a very specific combination of reasons: because the terms of that clause were imposed unilaterally by one of the parties,[7] because it was a highly integrated clause that contained three different provisions that the PMPA makes it illegal to impose on a franchisee, because the arbitration clause itself specified that, as to any claims

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[6] Our decision to strike the entire clause rests in part upon the fact that the offensive provisions clearly represent an attempt by ARCO to achieve through arbitration what Congress has expressly forbidden. . . .

Petition for Certiorari, Appendix, at A-9.

[7] See Petition for Certiorari, Appendix, at A-5. The record provides ample support. Late in 1990 ARCO sent to Graham, which had been an ARCO distributor for more than 40 years, a form of agreement to "renew" Graham's ARCO franchise effective January 1, 1991. ARCO specifically refused to bargain over any terms of the renewal. See page 2, *supra*. ARCO thus required a franchisee which had operated under the ARCO brand for more than four decades to choose between giving up the relationship upon which it had built its business and signing an agreement which, for the first time in the history of that relationship, purported to preclude resort to important features of the PMPA.

under the franchise agreement, the arbitration clause in its entirety would survive the termination or expiration of the agreement, and because all of its unlawfully-imposed provisions were part of a unified procedure for handling all disputes. The Petition for Certiorari does not attempt to show that this is a combination of factors that is likely to recur.

In briefing this matter to the Ninth Circuit neither party was able to find authority suggesting that there are *any other* petroleum franchise agreements that impose a requirement that PMPA claims be submitted to arbitration. If in fact other petroleum franchisors are including in their franchise agreements arbitration clauses that cover PMPA claims, there is no reason to believe those clauses are similar to the one involved here.

In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21 (1985) this Court made it clear that the policy underlying the Federal Arbitration Act, 9 U.S.C. §§ 1-16, is that of enforcing private agreements; it is not based on a Congresssional preference for arbitration as a method of resolving disputes. No violence is done to the policy of the Federal Arbitration Act when an arbitration clause that has been imposed by one party on the other rather than mutually agreed to is held invalid because it contains multiple illegal provisions.

The decision below does not disapprove of arbitration clauses as such. See Petition for Certiorari, Appendix, at A-5. It raises no barriers to including in such clauses waivers of statutory rights if those waivers are the subject of true mutual agreement rather than adhesion. *Id.* It does not prevent the parties from making clear their intention that if certain portions of their arbitration clause, including their voluntary waivers, should be held invalid the rest of the arbitration clause shall remain in force. *Id.* at A-8.

ARCO contends that the provisions which the Ninth Circuit held it was illegal for ARCO to impose on Graham have "real benefits" to franchisees as well as to franchisors. Petition for Certiorari at 9. The Ninth Circuit's decision leaves ARCO free to persuade its franchisees of those benefits. The decision does not prevent ARCO, or any other franchisor subject to the PMPA, from obtaining its franchisees' voluntary agreement to such provisions.

III.

If the Decision Below Does Have Significance Beyond the Facts of This Case, Its Authority Is Limited to Issues Arising Under the Petroleum Marketing Practices Act

ARCO wants this Court to believe that the decision in this case "could invalidate many arbitration clauses in a wide variety of settings." Petition for Certiorari at 7. In fact,

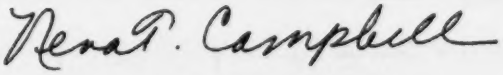
however, the Ninth Circuit's opinion is highly specific to the setting in which the case arose -- disputes subject to the PMPA. That court's initial concern was that the arbitration clause "purports to waive certain statutory rights conferred upon petroleum franchisees by the PMPA." Petition for Certiorari, Appendix, at A-3. The court began its analysis of the validity of the clause by examining the purpose of the PMPA. *Id.* at A-3, A-4. It evaluated the importance of the statutory rights that the clause would eliminate by examining the relationship of those rights to the policies of the PMPA. *Id.* at A-7. In concluding that the entire arbitration clause must be stricken, the court relied heavily on its inconsistency with the purpose of Congress in enacting the PMPA. *Id.* at A-9.

This is not a decision about the right of contracting parties to agree to arbitration of any and all statutory claims. It is a decision about one petroleum franchisor's attempt to deprive its franchisee of rights expressly granted by the Petroleum Marketing Practices Act. The United States Court of Appeals for the Ninth Circuit has correctly held that attempt should not succeed. Review by this Court is not necessary.

CONCLUSION

For all of the reasons discussed above, this case presents no issue appropriate for the Court's review. The Court should deny ARCO's Petition for Writ of Certiorari.

Respectfully submitted,



MILDRED J. CARMACK
NEVA T. CAMPBELL
Counsel of Record
SCHWABE, WILLIAMSON
& WYATT
Attorneys for Respondent
Pacwest Center, Suites 1600-1800
1211 S.W. Fifth Avenue
Portland, OR 97204
(503) 222-9981

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No. 94-2060

SUPREME COURT OF THE UNITED STATES

October 1994 Term

ARCO Products Co.,
Petitioner,

v.

Graham Oil Co.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY SUPPORTING PETITION FOR WRIT OF CERTIORARI

Charles F. Adams (Counsel of Record)
Randolph C. Foster
Joseph D. Cohen
Stoel Rives, Suite 2300
900 SW Fifth Avenue
Portland, OR 97204-1268
(503) 224-3380
Counsel for Petitioner

11 pp

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ARGUMENT

1. Summary.

In opposing certiorari, Respondent says that this case is limited to its own facts and to one statute. This is wrong; Judge Reinhardt's sweeping logic applies to typical arbitration clauses that implicate almost any statutory remedy. Respondent also argues that the arbitration provisions were not "mutual" (in the sense that they were not desired by Respondent) and therefore are invalid. This argument is legally unsupportable in light of the decisions of this Court and the courts of appeals. Finally, Respondent says that this case does not involve appellate fact-finding. Respondent is wrong. And if Respondent were correct, it would only increase the need for review because the majority opinion would have used additional incorrect rules of law.

2. The majority's logic applies to almost every arbitration clause that modifies a statutory right.

Respondent argues that the majority opinion below has only limited effect. Examination of the majority's rationale shows the opposite. The majority says that:

1. The arbitration provisions affect rights granted by statute.
2. The statute is designed to remedy a "disparity of bargaining power," *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1246 (9th Cir. 1995), that are "important to the effectuation of the [statute's] policies," *id.* at 1248, and therefore are unwaivable.
3. The arbitration provisions containing these waivers are "highly integrated," *id.* at 1248; valid even if the remainder of the agreement is invalid, *id.* at 1249; and "establish[] a unified

procedure for handling all disputes, and its various unlawful provisions are all a part of that overall procedure." *Id.*

These rationales are not narrow or limited. They apply to most arbitration provisions that could modify statutory rights. First, a standard arbitration clause is broad enough to cover rights created by a variety of statutes, *e.g.*, almost *any* consumer, employment, securities, or franchise, or any other legislation. *See, e.g.*, American Arbitration Association, Commercial Arbitration Rules, Standard Arbitration Clause (covering "[a]ny controversy or claim arising out of or relating to this contract, or the breach thereof . . ."). Second, these statutes are typically designed to change the balance of bargaining power among private actors by creating new procedural or substantive rights. *Cf., e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991) (citing employer/employee and security dealer/investor relations as examples of unequal bargaining power).[1]

Finally, the majority's description of the three salient features of the arbitration provisions and their relation to the waivers also applies broadly. Respondent does not dispute that such waivers are typical in arbitration agreements used in a wide variety of settings. Those provisions can easily be characterized as meeting the majority's test of "integrated" or (assuming that there are degrees of integration) "highly integrated." As the majority

---

[1]The majority opinion does not even depend on whether the statutory rights come into play. For instance, the majority condemns the shortened limitation period without any finding that it is at issue. Thus, the majority's rationale allows a party to avoid arbitration of a common law claim if that party can point to any modification of a statutory right, even if that right or statute is not involved in the case.

admits, all arbitration clauses are severable from the remainder of the contract (absent clear, contrary intent). *Graham Oil.* 43 F.3d at 1248; *see Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967). Thus, like the clause here, arbitration clauses are, as a rule meet the majority's test of being "valid even if the remainder of the agreement is invalid." Finally, every arbitration clause meets the third part of the majority's test by establishing a "unified procedure for handling disputes," and any waivers, like the waivers here, become "part of that overall procedure."

So contrary to Respondent's argument, the majority's rationales apply widely outside the PMPA setting. The majority opinion allows the invalidation of many arbitration clauses containing provisions affecting statutory remedies. As pointed out in the Brief *Amicus Curiae* of Kaiser Foundation Health Plan, the danger is not hypothetical. The majority opinion is now the springboard for wholesale attacks on arbitration clauses outside the PMPA context. It is a dangerous precedent that multiplies litigation; delays or avoids arbitration; and invalidates entire arbitration agreements that "stand up quite well without the offending provisions and would have been acceptable to both parties in that form," *Graham Oil,* 43 F.3d at 1251 (Fernandez, J., dissenting), and does so based solely on "satellite" provisions, *id.* at 1250, that may not even be involved in the dispute.

3. **The purported lack of mutual agreement is not a basis for invalidating an arbitration clause.**

Petitioner pointed out that the modifications of statutory rights are "mutual" -- they apply to both parties. Respondent argues that the modifications are invalid because they were not "mutually agreed to." Although it sounds similar, this argument

does not question Petitioner's point. Moreover, it is fatally flawed.

If it is based on the notion that the particular arbitration provisions in this case are adhesive as a matter of fact, then the argument is based on improper appellate fact finding. If, on the other hand, it is based on a rule that arbitration provisions in a form contract are adhesive as a matter of law, it is contrary to the well-established holdings of this and other courts.

To the extent that Respondent's argument is factually based, it contradicts both the holdings of this Court and the Ninth Circuit that determinations of unequal bargaining power must be made case-by-case, by the district court. *See, e.g., Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 934 (9th Cir. 1992) (*quoting Gilmer,* 500 U.S. at 33). Here, the district court made no such determination. So if the majority opinion is based on factual determinations, it is improper, *appellate* fact-finding and more reason to issue a writ of certiorari.

To the extent that Respondent is arguing that the arbitration clause is *per se* adhesive, such an argument contradicts the law. A decision whether an arbitration provision is adhesive must be made in light of the federal statutory pro-arbitration policy. *E.g., Cohen v. Wedbush, Noble, Cooke, Inc.,* 841 F.2d 282, 285 (9th Cir. 1988) (addressing similar contentions "mindful of the Supreme Court's dictate that 'questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'" (quoting *Moses H. Cone Mem. Hosp.,* 460 U.S. at 24.). When this is done, courts consistently reject a rule that arbitration provisions are *per se* adhesive.

For instance, in *Pritzker v. Merrill Lynch, Pierce,*

Fenner & Smith, Inc., 7 F.3d 1110, 1118 (3d Cir. 1993), the arbitration clauses were in form agreements and the parties had unequal bargaining power, but the court "reject[ed] any insinuation that the clauses represent contracts of adhesion." *See also, e.g., Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 700 (10th Cir. 1989) ("There is certainly nothing inherently unfair about the arbitration clauses, and they are therefore valid and enforceable.") (emphasis deleted) (citing *Surman v. Merrill, Lynch, Pierce, Fenner & Smith*, 733 F.2d 59, 61 n.2 (8th Cir.1984)); *Coleman v. Prudential Bache Sec., Inc.*, 802 F.2d 1350, 1352 (11th Cir. 1986) ("[T]here is nothing inherently unfair or oppressive about arbitration clauses") (citing *Surman*); *In re Sharp Electronics Corp.*, 604 F. Supp. 239, 242 (S.D.N.Y. 1984) (arbitration clauses in franchise agreements are not uncommon and are not unconscionable).

The majority below originally included the kind of argument advanced by Respondent, *see Graham Oil Co. v. ARCO Products Co.*, slip op. at 15520-21 (9th Cir. Dec. 16, 1994) (arbitration provisions here were contracts of adhesion that must be strictly construed against the drafter), but withdrew it after the Petition for Rehearing. Thus, even the majority below realized that this kind of argument is incorrect, and cannot stand up to scrutiny. So if the opinion below still incorporates Respondent's argument, it increases the need for review; it demonstrates either appellate fact-finding or a rule of law that contradicts the policies of the Federal Arbitration Act and the holdings of this and other courts.

4. **The majority actually engaged in improper appellate fact-finding.**

Respondent dismisses fact-finding by the majority below as a "rhetorical device." This argument asks this Court to ignore

not only what the majority said, but also what it actually did.

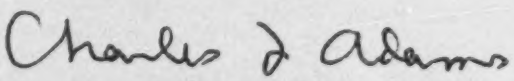
The majority relied on its view of Petitioner's intent and goals: Petitioner's supposed "attempt . . . to achieve," Petitioner's supposed "attempt[] to use," Petitioner's supposed "unlawful ends," and Petitioner's supposed "scheme to contravene public policy." *Graham Oil,* 43 F.3d at 1249. These are all factual issues, unsupported by any finding in the trial court. Thus, the majority not only said that it relied on determination of "fact"; it actually relied on factual findings that were not made in the trial court.

Moreover, while arguing that the majority did not rely on appellate fact-finding, Respondent offers no other adequate explanation for the majority opinion. But if the majority did not engage in fact finding, it must have reached a conclusion that is contrary to law. If it did not find facts, the majority must have concluded that statutory waivers prove illegal intent, illegal goals, and a scheme to contravene public policy *as a matter of law*. This is incorrect. The majority instead should have applied two rules of law. The first is that of *Cone,* that all doubts are resolved in favor of arbitration. The second is the well-accepted rule of contract and arbitration law that illegal provisions in contracts are to be disregarded or curtailed, John D. Calamari & Joseph M. Perillo, THE LAW OF CONTRACTS § 22-2(d), at 893 (3d ed. 1987), including such provisions in arbitration clause. *E.g., Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 217 (1985). The majority did not acknowledge (or apply) either rule. So if the majority did not engage in appellate fact-finding, there is additional reason to grant certiorari.

5. Conclusion.

The majority opinion affects every broad arbitration clause that has any language that potentially modifies a statutory right. The decision below is now being to attack those clauses in non-PMPA settings. Respondent's arguments are either wrong, or if credited, mean that the majority opinion below is an even more radical break with the arbitration law embodied in the precedents of the courts of appeals and this Court. Therefore, this Court should issue a writ of certiorari to review this case.

Respectfully submitted,



Charles F. Adams (counsel of record)
Joseph D. Cohen
Randolph C. Foster
Counsel for Petitioner

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In The

Supreme Court of the United States

October Term, 1994

ARCO PRODUCTS CO.,

Petitioner,

vs.

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF KAISER FOUNDATION HEALTH PLAN, INC. FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION AND BRIEF *AMICUS CURIAE*

KENNEDY P. RICHARDSON
Counsel of Record
Attorneys for Amicus Curiae,
Kaiser Foundation Health Plan, Inc.
1611 Telegraph Avenue
Suite 707
Oakland, California 94612
(510) 451-6770

7093
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

18 pp

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In The

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ARCO PRODUCTS CO.,

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GRAHAM OIL CO.,

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF *AMICUS CURIAE*, KAISER FOUNDATION HEALTH PLAN, INC. FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION

A. Motion

Pursuant to Rule 37.2, Kaiser Foundation Health Plan, Inc. ("Kaiser") hereby moves for permission to file the following brief as amicus curiae in support of the pending petition for a writ of certiorari in the above-entitled appeal. Petitioner ARCO

Products Co. has consented to the filing of the proposed amicus brief. (*See* Appendix). Counsel for Respondent Graham Oil Co. informed Kaiser's counsel on July 12, 1995 that her client refused to consent. The reason given for the Respondent's refusal did not pertain to the merits of Kaiser's right to express its views concerning the pending petition.

B. Grounds For the Motion

As explained further in Part I of the proposed brief, Kaiser, a pioneer in organizing pre-paid health care services on a large scale, has a compelling interest in seeking reversal of the Court of Appeals' decision below. For over twenty years Kaiser has used arbitration as a vehicle for achieving just resolutions of disputes with its members without the frequent delays and additional expense of court litigation. Kaiser's arbitration program is assertedly threatened by the decision below because Kaiser's arbitration provision contains a general attorneys' fee/cost allocation clause that arguably conflicts with the provisions of particular federal statutes. Prompted by the decision below, Kaiser's adversaries are arguing that Kaiser's arbitration provision must be struck down *in toto*. Kaiser therefore believes that there is an urgent need for this Court to examine and reverse this ill-conceived Ninth Circuit precedent.

While Kaiser agrees with the excellent analysis set forth in Petitioner's brief, Kaiser's proposed amicus brief addresses other legal issues that are directly germane to the merits of the petition. In particular, Kaiser's brief explains that, assuming *arguendo* the correctness of the panel majority's interpretation of the Petroleum Marketing Practices Act ("PMPA"), the majority's interpretation of the disputed clauses of the ARCO/Graham Oil arbitration provision inexplicably ignores the most rudimentary principles of contract interpretation. In addition, Kaiser's brief demonstrates that the majority erred in choosing to decide the

legality of these clauses in the first place. Under this Court's recent decisions, *e.g., Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, __ U.S. __, 63 U.S.L.W. 4617, 1995 WL 360200 (June 19, 1995), the interpretation of the subject clauses and whether they are in a collision course with PMPA are matters that must be decided by the arbitrators in the first instance. Thus, an obvious solution to the problem at hand is an order summarily granting the petition and remanding to the Court of Appeals for reconsideration in light of *Vimar Seguros*.

On the basis of the foregoing, Kaiser respectfully asks that the Court allow its amicus brief to be filed so that the Court can consider the legal analysis set forth therein.

Respectfully submitted,

KENNEDY P. RICHARDSON
Counsel of Record
Attorneys for Amicus Curiae,
Kaiser Foundation Health Plan, Inc.
1611 Telegraph Avenue
Suite 707
Oakland, California 94612
(510) 451-6770

Dated: July 17, 1995

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Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF KAISER FOUNDATION HEALTH PLAN, INC. IN SUPPORT OF PETITION

KAISER FOUNDATION HEALTH PLAN'S INTEREST AS *AMICUS CURIAE*

Kaiser Foundation Health Plan, Inc. ("Kaiser") submits this brief in support of petitioner ARCO Products' petition for a writ of certiorari. Kaiser does so because the decision below has been heard throughout the Ninth Circuit as the death knell for any

institutional arbitration provision that contains generally worded clauses that arguably alter the procedural rights or remedies that attach to court litigation of a federal statutory claim. The arbitration programs of Kaiser and other organizations, both within and outside the health care industry, are under attack because their arbitration agreements contain one or more generally worded clauses similar to those that were condemned by the majority panel opinion in this case.

Kaiser, a non-profit corporation, and its affiliates operate health maintenance organizations ("HMOs") in California and other parts of the United States. These HMOs arrange for health care services to millions of people under medical and hospital service agreements entered into with government agencies, private employers, union-management welfare funds, and individual subscribers. The basic terms of these service agreements are standard provisions that are subject to review and approval by state licensing agencies and the U.S. Department of Health and Human Services. Kaiser is regulated by the latter agency because Kaiser's HMOs are federally qualified under the federal Health Maintenance Organization Act of 1973, 42 U.S.C. § 300e *et seq.*

The service agreements of the Kaiser HMOs in California and in several other regions of the United States include standard arbitration provisions. Kaiser's California arbitration provision, which applies to more than 4 million members, encompasses any claim that

> arises from alleged violation of any duty incident to or arising out of this Agreement, including any claim for medical or hospital negligence or for premises liability, irrespective of the legal theories upon which the claim is asserted.

The enforceability of this provision is governed by the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, because the performance of the underlying HMO agreements involve and affect interstate commerce.

The Kaiser arbitration provision provides, *inter alia*, that each side must bear its own attorneys' fees and costs, except for the expenses of the neutral arbitrator, which are borne equally. This generally worded "pay your own" attorneys' fee/cost clause reflects California's statutory "pay your own" rule that applies when a California arbitration agreement is silent regarding the recoverability of fees and costs. Calif. Code of Civ. Pro. § 1284.2; *Dickinson v. Kaiser Foundation Hospitals*, 112 Cal. App. 3d 952, 954, 169 Cal. Rptr. 493 (1980).

The Kaiser California HMOs have used arbitration for more than twenty years. In 1976, the California Supreme Court held that the provision is not an illegal "adhesion contract" because arbitration is favored by public policy and does not impair the parties' substantive rights and obligations. *Madden v. Kaiser Foundation Hospitals*, 17 Cal. 3d 699, 710-12, 131 Cal. Rptr. 882 (1976).

Kaiser's interests are adversely affected by the opinion below. While most Kaiser arbitrations involve state law claims of medical malpractice, many arbitrated cases include claims that are asserted under various federal and state statutes that provide for attorneys' fee awards to the prevailing party in court *actions* that are instituted under these statutes. In the wake of the Court of Appeals' opinion, claimants who assert these statutory claims are now arguing that the *entire* arbitration provision is unenforceable because it requires the parties to bear their own attorneys' fees and costs. Whether or not these statutory claims are joined with common law malpractice claims, the Court of Appeals' opinion is a dangerous precedent that is spawning considerable litigation

that seeks the wholesale nullification of institutional arbitration provisions that contain "pay your own" attorneys' fee/cost clauses. Kaiser therefore has a very strong interest in persuading this Court to rectify the Ninth Circuit's error.

SUMMARY OF ARGUMENT

Like the arbitration agreements used by Kaiser and other organizations, the ARCO/Graham Oil contract contains a pre-dispute arbitration provision that obligates the parties to arbitrate a wide variety of claims that relate to the parties' contractual relationship. The universe of arbitrable claims far exceeds those that are subject to the Petroleum Marketing Practices Act ("PMPA"). In this context, the disputed clauses of the ARCO/ Graham arbitration provision are lawful *on their face*. Furthermore, under well recognized principles of contract interpretation, the legality of the disputed clauses is easily preserved by construing them as applying only to disputes that are not subject to PMPA. Thus, the majority opinion below plainly erred in finding that the disputed clauses are illegal.

The meaning and validity of these clauses, however, are for the arbitrators to decide in the first instance. Whether the clauses contemplate a remedial scheme that conflicts with PMPA is a matter that the parties agreed to submit to arbitration. *If* the arbitrators render an award that offends PMPA, the lower courts can then be called upon to vacate the award in accordance with the standards set forth in section 10 of the Federal Arbitration Act, 9 U.S.C. § 10 and *First Options of Chicago, Inc. v. Kaplan*, __U.S. __, 115 S. Ct. 1920, 1923-24, 63 U.S.L.W. 4459 (May 22, 1995).

If the challenged clauses are illegal and the severability issue must be reached, the Ninth Circuit's decision to strike down the

entire arbitration provision defies rudimentary contract analysis and subverts the strong federal policy in favor of arbitration. The majority opinion can be read as creating a presumption of non-severability that will nullify any arbitration provision that contains a subsidiary term that is found to transgress a federal statute.

ARGUMENT

I. The Court of Appeals Erred in Concluding That the Allegedly Offensive Clauses Are Illegal.

For purposes of the present analysis, Kaiser will assume *arguendo* that the majority opinion below correctly concluded that the PMPA provisions concerning the recoverability of attorneys' fees and punitive damages and the applicable limitations period are both non-waivable and intended to apply to contractual arbitrations.[1] The majority, however, erred in assuming that this conclusion necessarily rendered the disputed contract clauses illegal *per se*. Under fundamental principles of contract interpretation, the contract terms in question must be construed as facially lawful but subordinate to the overriding requirements of PMPA.

---

1. Whether a fee/cost shifting statute applies to arbitration proceedings is an issue that turns on the legislative intent behind the statute. While fee shifting may make sense in the context of expensive court litigation, it can interfere with the speed and economy of arbitration proceedings. Depending on the context, it may be appropriate to limit a statutory fee shifting provision to the fees incurred in prosecuting or defending civil court *actions*, particularly if the wording of the statute is so limited. *See, e.g., Graphic Communications Union v. GCIU-Employer Retirement Plan*, 917 F.2d 1184, 1188-89 (9th Cir. 1990) (upholding equal cost sharing clause in arbitration agreement against contention that it violated ERISA's fee/cost shifting provision); *Cann v. Carpenters' Pension Trust Fund*, 989 F.2d 313, 315-17 (9th Cir. 1993) (holding that ERISA's fee/cost shifting statute does not apply to fees incurred before commencement of court litigation).

The substantive scope of the ARCO arbitration provision is by no means limited to claims under PMPA. The provision applies to "any dispute or controversy relating to or arising out of the" ARCO/Graham distributorship agreement. The broad scope of the arbitration provision clearly embraces common law tort claims and a wide variety of non-PMPA statutory claims that do not implicate a statutory right to attorneys' fees, punitive damages, or a specified limitations period. One must therefore conclude that the attorneys' fee, punitive damages, and limitations terms of the provision are not illegal on their face because there are any number of dispute settings in which these terms would be beyond reproach. Because the meaning of a contract is determined as of the time when the contract was made, *e.g.*, 4 *Williston, Law of Contracts* § 601 at 306 (3rd W. Jaeger ed. 1961), it is implausible that the parties intended that the subject clauses would apply only to a subset of disputes within the broad substantive reach of their arbitration agreement.

Given the assumption made at the outset, the real issue is whether the clauses in question should be *construed* as illegal in the context of this case because they conflict with PMPA. The putative conflict, however, is readily avoided with the aid of conventional rules of contract interpretation.

In construing a contract, a court ordinarily proceeds from the presumption that the parties intended the contract's terms to have a lawful meaning. *E.g., Restatement of the Law, Second, Contracts* § 203(a); *Williston, supra*, § 620 at 747-51. Another axiom holds that relevant statutes "enter into and form a part of the contract as fully as if expressly incorporated therein." *Williston, supra* § 615 at 597. In the context of the present case, these principles point to a straightforward interpretation: the overriding PMPA provisions are deemed to be a part of the contract and qualify the express contract clauses in the context of a claim governed by PMPA. Any other conclusion would force

contract drafters to undertake the absurd task of expressly enumerating every type of claim that is possibly exempt from the generally worded clauses.

In sum, even if the public policy favoring arbitration is ignored, traditional contract analysis compels the conclusion that the disputed contract clauses are not illegal, either on their face or as they would likely be applied in this case. Thus there is no need to even reach the issue of whether these clauses are severable from the main arbitration covenant.

II. The Interpretation of the Disputed Clauses Should First Be Decided by the Arbitrators.

What has been said so far rests on the dubious assumption that *de novo* judicial interpretation of the challenged clauses is appropriate at the early stage of a motion to compel arbitration. This Court, however, has held that the courts should not speculate on whether arbitrators will construe a contract so as to place it in conflict with the remedial provisions of a federal statute. Most recently, in *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, __ U.S. __, 63 U.S.L.W. 4617, 1995 WL 360200 (June 19, 1995), a party seeking to avoid arbitration argued that a foreign arbitration panel would construe the arbitration agreement as eliminating the protections afforded by the federal Carriage of Goods by Sea Act. The Court held that this challenge was premature because the arbitrators had not yet been afforded an opportunity to construe the contract. *Id.* at *8 [Westlaw pagination].

The Court's recent decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, __ U.S. __, 115 S. Ct. 1212, 63 U.S.L.W. 4195 (Mar. 6, 1995) tacitly confirms that the *Vimar Seguros* approach is fully applicable to the remedial issues herein. In *Mastrobuono*, individual investors were awarded punitive

damages in an arbitration over various claims they asserted against Shearson Lehman. The lower courts vacated the punitive damages award, holding that the arbitrators should have construed the choice of law clause of the arbitration agreement as incorporating a state law prohibition against arbitral awards of punitive damages. Although this Court upheld the arbitrators' interpretation based on the Court's own *de novo* examination of the contract, (*id.* at 1215 n. 1 & 1217 n. 4), neither Justice Stevens' majority opinion nor Justice Thomas' dissenting opinion suggests that the arbitrators lacked the power in the first instance to construe the extent of their remedial authority under the contract.[2]

In the case at hand, the Ninth Circuit clearly erred in deciding the legality of the disputed clauses before these issues were determined by the arbitrators in accordance with the parties' agreement. Under these circumstances, the Court may choose to issue an order summarily granting the petition herein and remanding to the Court of Appeals for reconsideration in light of *Vimar Seguros, supra.*

III. Assuming the Disputed Clauses Are Illegal, the Court of Appeals Erred in Refusing to Sever the Clauses from the Main Arbitration Covenant.

If the severability issue must be reached, it is difficult to fathom how and why the majority below arrived at their finding that the offensive clauses are not severable from the parties' basic agreement to submit the claims in question to arbitration. The

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2. Regarding whether the arbitrators' decision should be accorded deference, both Justice Stevens' and Justice Thomas' opinions (*id.* at 1215 n.1 & 1219 n.1) expressly left this issue open pending *First Options of Chicago, Inc. v. Kaplan*, __ U.S. __, 115 S. Ct. 1920, 1923-24, 63 U.S.L.W.4459 (May 22, 1995) (recognizing deferential standard applies to review of arbitrators' decisions on arbitrable issues).

contractual limitations period has had no impact on this case because plaintiffs commenced their action well within the specified time period. In any event, there is no functional interdependence between the arbitration process and the duration of the applicable statute of limitations.

The same holds true with respect to the challenged attorneys' fee and punitive damage clauses. As observed by Professor Corbin:

> When [a provision excluding a remedy] is so declared [to be in violation of public policy], it has almost always been held that the validity of the bargain in other respects is not impaired. The illegal provision is merely disregarded.

6A *Corbin On Contracts* §1527 at 779 (West 1962).

Any lingering doubt on the severability issue should be resolved by the public policy favoring arbitration that has been repeatedly reaffirmed by this Court. The importance of this policy is exemplified by the California Supreme Court's decision in *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981), in which the California court was faced with a far more difficult severability issue than the one presented here. There, the plaintiff appealed from an adverse award rendered under an arbitration provision that designated an arbitral panel that was clearly biased in favor of his adversary. Although the California court held that the arbitrator designation term was unconscionable, it was careful not to nullify the entire arbitration agreement. Rather, the court held that "[i]n light of the strong public policy of this state in favor of resolving disputes by arbitration[,]" the remainder of the arbitration provision was still valid. The court accordingly directed the trial court, on remand, to order arbitration before a different arbitrator chosen by the parties or appointed by the trial court. *Id.* at 831.

The challenged clauses herein are collateral appendages that can be cleanly excised without affecting either the parties' agreement to arbitrate or the arbitral forum chosen for this purpose. A judicial severing of the disputed clauses would only enhance Graham Oil's remedial rights. On these facts, the majority opinion below can only be seen as turning this Court's longstanding pro-arbitration policy on its head.

CONCLUSION

On the basis of the foregoing, Kaiser respectfully urges the Court to accept this case for full review or, in the alternative, to grant the petition for the purpose of a summary remand to the Court of Appeals for reconsideration in accordance with *Vimar Seguros, supra.*

Respectfully submitted,

KENNEDY P. RICHARDSON
Counsel of Record
Attorneys for Amicus Curiae,
Kaiser Foundation Health Plan, Inc.
1611 Telegraph Avenue
Suite 707
Oakland, California 94612
(510) 451-6770

STOEL RIVES BOLEY
JONES & GREY
Attorneys at Law
Suite 2800
Standard Insurance Center
900 SW Fifth AVenue
Portland, Oregon 97204-1268
Telephone (503) 224-5380
Telecopier (503) 220-2480
Cable Lawyers
Telex/03455
Writer's Direct Dial Number
(508) 394-9458

July 14, 1995

BY FAX (510) 451-1711
BY FEDERAL EXPRESS

Mr. Kennedy P. Richardson
1611 Telegraph, Suite 707
Oakland, CA 94612

Re: ARCO Products Co. v. Graham Oil Co. — Amicus Brief

Dear Mr. Richardson:

This letter confirms that Atlantic Richfield Company, and its division ARCO Products Company, consents to the filing of an amicus curiae brief by Kaiser Foundation Health Plan in support of ARCO's petition for writ of certiorari in this case.

Very truly yours,
s/ Randolph C. Foster
Randolph C. Foster

RCF:bjc